Central Law Journal.

ST. LOUIS, MO., SEPT. 19, 1902.

A NEW JUSTICE OF THE UNITED STATES SUPREME COURT.

The bar of the country as well as the general public is to be congratulated in the appointment of Justice Oliver Wendell Holmes of Massachusetts as Associate Justice of the United States Supreme Court to fill the place made vacant by the resignation of Justice Horace Gray. Justice Holmes hails from the same state as the retiring justice thus preserving that sectional representation in our highest court of appeals which is so desirable. As a son of the distinguished author, Oliver Wendell Holmes, our new justice has received a more than usually hearty welcome from the general public, and has effectually exploded the old notion that genius was not hereditary. The son will probably outshine the father if the ordinary span of life is vouchsafed him. He is but sixty years of age and of most vigorous intellect. He is a graduate from the halls of Harvard and from the battlefields of Antietam and Fredericksburg, a happy combination of executive and intellectual activity that is well calculated to give one the necessary mental poise for attempting the solution of the complex social problems of our twentieth century civilization.

The judicial life of Justice Holmes dates from the year 1882 when he was appointed justice of the Massachusetts Supreme Court. Later he was made chief justice of the same court, which office he has honored up to the hour of his present appointment. During all this time his genius, a "capacity for hard work," has dominated the court over which he has presided. His insight into the deepest problems of the law evidences an ability equaled only by his illustrious predecessor, Chief Justice Shaw. And in clearness of perception and perspicuity of expression one is reminded of that master of clear judicial expression, the late Justice Miller of the United States Supreme Court. These characteristics eminently qualify Justice Holmes for a career upon the bench of our most exalted tribunal that will reflect honor and dignity upon the office as well as upon the man who occupies it.

EFFECT OF THE NEGLIGENCE OF A JUSTICE OF THE PEACE UPON THE RIGHTS OF PARTIES LITIGANT WHO HAVE DONE ALL THAT IS REQUIRED OF THEM, BUT THE JUSTICE FAILS TO DO HIS DUTY.

Of all judicial officers throughout the country the justice of the peace is not only the most numerous class but also that which is as a whole the most unlearned in the law. For both reasons errors are of more frequent occurrence than in any other judicial tribunal in the country.

The errors of a justice are principally in matters of mere detail and for this reason are very exasperating to lawyers of ability who sometimes find it necessary to practice in such courts. No matter with what care a lawyer may prepare his papers and watch the procedure, there are certain matters that come only under the eye of the justice and his assistants, and over these, the most painstaking attorney has no control. Here errors and mistakes creep in which often threaten absolutely to defeat plaintiff's case.

In such cases, the injured party, either plaintiff or defendant, looks around for a remedy. The civil liability of the justice himself is first suggested. On this point the law is perfectly clear but its application is perfectly otherwise. The law is that a justice is liable for misfeasance, malfeasance or nonfeasance in the performance of any of his ministerial duties but not for any act, whether committed negligently or maliciously, which is in its nature judicial. The difficulty in the application of this rule is in distinguishing between judicial and ministerial acts, since the justice in performing his duties generally acts in the dual capacity of clerk and judge. Where these can be distinguished the injured party can determine his remedy against the justice quite readily. However, a good lawyer will not often suffer injury from the judicial errors of the justice since as to these he can so present his pleadings and his objections as to have a sufficient remedy on appeal. Only in cases where the justice acts without jurisdiction is he without adequate remedy and in such cases the law makes an exception and permits him to recover damages. Vaughan v. Congdon, 56 Vt. 111; Patzack v. Von Gerichten, 10 Mo. App. 424; Bradley v. Fisher, 13 Wall. (U. S.) 335; Wright v. Rouss, 18 Neb. 234; Holtzman v. Robinson, 2 MacArthur (D. C.), 520; Kelley v. Bennis, 4 Gray (Mass.), 83, 64 Am. Dec.

50. See *contra*, however: Heath v. Halfhill, 106 Iowa, 131; Allee v. Reece, 39 Fed. Rep. 341. As instances of ministerial acts for which justice is liable might be mentioned his refusal of the right to appeal (Guenther v. White Acre, 24 Mich. 503); his failure to issue execution (State v. Currick, 70 Md. 586); his failure to make out a perfect transcript on appeal (Macdonell v. Buffum, 31 How. Pr. 158); and his failure to enter judgment after decision or in favor of the right party (Larson v. Kelley, 64 Minn. 51; Christopher v. Van Liew, 57 Barb. 17).

Another remedy is to leave unnoticed any error of the justice of this character; for, if the defendant also fails or neglects to notice them until after judgment, his objection then is too late. The general rule in such cases is that the mere negligence of the justice in doing a ministerial act, as in failing to sign a paper in the manner designated by statute, or directing summons to the wrong party, or failing to annex a copy of the account to the summons, will not invalidate the judgment. People v. Dubois, 26 N. Y. S. 895; Woods v. Johnson, 58 Ga. 138; McCabe v. Payne, 37 Ark. 450; Benson v. Carrier, 28 S. Car. 119: Telford v. Coggins, 76 Ga. 683.

Another remedy is by amendment in the justice court. Thus a constable's return can be amended to conform to the facts. Cassidy Bros. Commission Co. v. Estep, 63 Mo. App. 540. And a justice of the peace has power to make any such amendments to the summons as will show the action to be within this jurisdiction and to otherwise conform to the statute. Singer Mfg. Co. v. Barrett, 95 Cal. 36. After an appeal has been taken, however, and the papers filed with the circuit court, the justice cannot amend his return. Horton v. Railroad, 21 Mo. App. 147. The proper way to amend the record in such cases is by application or direction upon the justice to file an amended and corrected return. McNichols v. Hunt, 43 Ill. App. 451; Evangelical Society v. Koehler, 59 Wis. 650, 18 N. W. Rep. 476. Or else on appeal the injured party may show that he complied with all the requirements of the law and any defect was due to the negligence of the justice. Hicks v. Parks (Ky. 1895), 30 S. W. Rep. 202. In this case the transcript on appeal from a justice's judgment contained all the necessary papers except that a traverse and bond, duly signed and filed, had not been indorsed by the justice. The Supreme Court of Kentucky held that it was error in the lower court to exclude proof that the bond and traverse were duly executed and filed as required by law, but were not indorsed, owing to the negligence of the justice.

The effect of the failure of the justice on appeal of a case to file the transcript or record within the statutory time is a question on which the authorities are in some conflict. Some cases hold that the appellant cannot be deprived of his rights on appeal by the laches of the justice. Campbell v. Bechsenschutz (Tex), 25 S. W. Rep. 971; Larcher v. Scott, 2 Ala. 40; Norden v. Jones, 33 Wis. 600; Robison v. Medlock, 59 Ga. 598: Gumbertz v. Express Co., 28 Ind. 181; Lamon v. Gilchrist, 12 N. Car. 176; Pearce v. Renfroe, 68 Ga. 194. But the rule sustained by the later authorities is to the effect that where a justice from whom an appeal is taken to the circuit court fails to file the transcript within the statutory time, it is discretionary with the circuit court to dismiss the appeal, in the absence of any showing why they were not seasonably filed. Hughes v. Wheat, 32 Ark. 292; State v. Supreme Court, 9 Wash. 307; Pierce v. Pierce, 36 Tenn. 77; Edminster v. Rathburn, 3 S. Dak. 129. And in line with this rule it is also held to be the law that an agreement that the justice shall file the transcript in the district court will not relieve the appellant from the consequences of the justice's neglect to do so. Union Pacific R. R. v. Marston, 22 Neb. 721, 36 N. W. Rep. 153.

LIFE INSURANCE — DAMAGES FOR REFUSAL OF INSURER TO MAKE LOAN AS AGREED IN THE POLICY.—Quite an unusual case on the subject of damages is that of New York Life Insurance Co. v. Pope, 68 S. W. Rep. 851. In that case the insurer had agreed in the policy to loan to the insured a certain stated amount at different periods in the life of the policy. This agreement the company failed to keep on one occasion, and the insured attempted to rescind the contract and recover the premiums paid. In reversing a recovery secured by the insured in the lower court, the Court of Appeals of Kentucky held that the fact that the insurer refused to make the insured a loan, as agreed, does not entitle the insured to recover damages, in the absence of an averment that he was unable to procure the money from other sources at the same rate of interest at which the insurer agreed to furnish it. And the court further held that the measure of damages for failure to make the loans was the difference between

the rate of interest at which the defendant agreed to furnish the money and the rate, not exceeding the legal rate, which plaintiff was required to pay elsewhere, in the absence of an averment that the money was desired for a special use known to defendant, and that it could not be procured elsewhere. The court said in part:

"Here the agreement was not to pay, but to loan, appellee $212. When loaned, appellee would have owed it to appellant, and been bound to repay it. It is not charged that appellee desired to apply the loan to any special use of which appellant had notice, nor is it charged that appellee could not have procured the loan from other sources. If appellant had agreed to furnish appellee 212 bushels of wheat on that date, and had failed, the measure of damages would not have been the distress and disasters to which he and his family may have been subjected by not having had the wheat, but it would have been the difference in the market value of the wheat at that time and place and the contract price. In any event, appellee would have had to pay for the wheat. So, in this case, he would have had to pay for the money; that is, he would have had to repay the $212, and in addition the agreed rate of interest for the time used, not exceeding the lawful rate. Therefore, it would seem that if he could have got the same sum of money elsewhere on a loan at 5 per cent. interest, he was not damaged at all. If he was compelled to pay and did pay more interest than 5 per cent., then the difference, up to the legal rate, is the extent of his injury, and consequently must be the measure of his damage. Turple v. Lowe, 114 Ind. 37, 15 N. E. Rep. 834; Lowe v. Turple (Ind. Sup.), 44 N. E. Rep. 25, 47 N. E. Rep. 150, 37 L. R. A. 240; Sedg. Dam. 622."

CARRIERS—LIABILITY OF RAILROAD FOR UNSAFE CONDITION OF A UNION DEPOT WHICH IS NOT THE PROPERTY OF THE COMPANY.—It is an axiomatic principle in the law that the owner or occupant of land who, by invitation, express or implied, induces or leads others to come upon his premises for any lawful purpose, is liable in damages to such persons for injuries occasioned by the unsafe condition of the land or its approaches. Whether this principle can form the basis on which to found an action for subjecting a railroad company to liability for injuries occasioned by the negligence of a union depot company in failing to keep its premises in repair was the question before the court in the recent case of Herrman v. Great Northern Railway Co., 68 Pac. Rep. 82. In this case the Supreme Court of Washington announced the law on this subject to be that where a carrier uses a union depot for receiving and discharging passengers, it is liable for injuries occasioned by a negligent failure to keep the approaches thereto in safe condition, though the premises are under the control of a receiver of the depot company; for, if the receiver neglected to maintain safe premises, his negligence was that of the carrier, whose duty it was to maintain them.

The authorities on the question of the liability of individual railroad companies for the negligence of a union depot management or its agents are not numerous. In Turner v. Railway Co., 15 Wash. 213, 46 Pac. Rep. 243, 55 Am. St. Rep. 883, it was held that a ticket seller in a union depot, whose business it is to sell tickets over various lines of railway, whose trains enter and depart therefrom, is such an agent of any company furnishing tickets to be sold there which are accepted by the conductors of its trains as its tickets that the company is bound by any of the declarations of such ticket seller as to the running of its trains. This same principle is illustrated in all that class of cases which hold a railroad liable for the negligence of those to whom they have leased or turned over the operation of their means of transportation in certain particulars. Lakin v. Railroad, 13 Oreg. 436, 11 Pac. Rep. 68, 57 Am. Rep. 25; Cogswell v. Railway Co., 5 Wash. 43, 31 Pac. Rep. 411; Railroad Co. v. Brown, 17 Wall. (U. S.) 443; Pennsylvania Co. v. Ellett, 132 Ill. 654, 24 N. E. Rep. 559. So also, on the same principle, a railroad company which had by lease acquired the right to use a union depot in common with the others for the arrival and departure of its trains, with the use of its waiting rooms, ticket office, baggage room, etc., was held to be liable to passengers and the public generally in relation to the property as if it were the owner in fee. In speaking of this case the court, in the principle case, says: "The principle announced by the court is particularly pertinent to the discussion here. It thus seems clear that, as between respondent and its patrons and those having business with it at said depot, the duty rested upon respondent to see that the depot premises were safe as fully as though the premises had been owned by respondent. That such is the duty of a railroad company owning and using the premises there can be no doubt."

CONTEMPT—MASTER'S DISCHARGE OF SERVANT BECAUSE OF HIS BEING COMPELLED TO SERVE AS A JUROR.—The subject of contempt of court has recently been discussed in two cases the circumstances of which were very dissimilar. Judges always view with great severity any conduct whether tending directly to interfere with the course of justice—*e. g.*, where an attempt is made to intimidate a witness—or indirectly prejudicial to its due administration—as the punishment of a person, who has been obliged to take part in legal proceedings, for so doing. There is, of course, a wide difference between the two classes of contempt. The former may amount to an actual injury to the litigants in a particular case, and always proceeds from personal reasons. The latter may have no effect upon the litigants themselves, and may be dictated by motives altogether foreign to the subject-matter of, and parties to, the litigation. It is much easier to deter-

mine whether an alleged contempt of the former kind has been committed than whether a person has been guilty of the latter.

In one of the two cases referred to, the question was whether in an action against the proprietor of a newspaper to recover money paid to stop attacks on the plaintiff in the said newspaper the fact that the defendant, who had for years been publishing attacks on the plaintiff, continued to publish them after the commencement of the suit constituted a contempt of court by reason of the prejudice which might be thereby created in the minds of the jury who would have to try the case. It was not shown that the attacks had increased since the action had started, but had, if anything, rather moderated; and the judges thought that no effect was likely to be produced on the jury by the mere fact that the defendant had continued to publish articles which were not connected with the particular matter in dispute in this action. In effect they only amounted to so many more alleged libels of the same character, the truth or falsity of which would be a matter to be determined (if at all) in another action. There is an appreciable distinction between this and the publication of matter pending the trial with reference to it, and which may prejudice the jury.

In the other case, a much more difficult question is suggested, the solution of which was not, in the event, required, owing to a different state of facts being revealed from those which led the judge to take the course he did. Mr. Justice Walton had been informed that a person who had served as a juror had been dismissed from his employment because he had absented himself in order to comply with the jury summons. *Prima facie* this seemed such an arbitrary and reprehensible act on the part of the employer that the learned judge felt himself justified in requiring the master to attend and give an explanation, his lordship observing that, if the facts were as represented to him, he should have to consider very seriously what course he should adopt in what he characterized as a case of something very like contempt of court.

On further inquiry it appeared that the employer, who attended in court, had not dismissed the man because of the jury summons, but that he had filled up his place because he did not return the next day. The explanation rendered it unnecessary to decide what would have been the position had the facts been as originally represented. The learned judge's remarks suggest whether any punishable contempt would have been commited in that case. We are not aware of any reported decision which has gone so far as to make it an offense to dismiss a person who has been summoned as a juryman. In Rowden v. Universities Co-operative Association, 71 L. T. 373, where a witness had been dismissed for making an affidavit in an action in which his employers were concerned, it was contended on behalf of the employers that they were legally entitled to dismiss the employee, and that, on the principle afterwards elaborated in such cases as Bradford Corporation v. Pickles, 71 L. T. 319, and Allen v. Flood, 77 L. T. 717, the motive was immaterial. But Mr. Justice Kay said it made no difference whether the act complained of was in itself legal or not if it was done in such a way as to amount to an interference with the course of justice. In the case of the juryman, it is obvious that the same considerations do not arise, or, at any rate, in a very remote degree. It could hardly be said that to dismiss a person for service on a jury would be an interference with the course of justice, in the sense of prejudicing the case of the litigants. The contempt, if any, is rather in the nature of an insult to the law, and we do not see much difference between this and a burlesque of judicial proceedings or a general reflection upon judges and lawyers. In this view we depreciate judicial notice being taken of conduct, however indefensible on abstract principles, unless it can be effectively followed up by something more than mere censure. Indeed, unless a judge can commit for contempt in such cases, we do not see what power he has even to summon a person before him; and, if he has no such power, the excess of jurisdiction may only react prejudicially upon the influence and authority of the bench.—*Law Times* (London).

DEATH — ACTIONS FOR DEATH BY WRONGFUL ACT UNDER LAWS OF OTHER STATES OR FOREIGN COUNTRIES. — Conflicts of jurisdiction between the states of the American union are becoming more and more frequent as state lines are becoming more effectually obliterated by the close intercourse between them, thus necessitating a generous and most extensive application of what are known as principles of comity. In all actions based on the common law, whether founded in contract or tort, these principles are universally applied. In the case of statutory remedies the rule is otherwise. Criminal or penal statutes, for instance, have no extraterritorial force, and are not usually enforceable in other jurisdictions. In all other cases where the remedy sought is founded upon the statutes of a foreign state, there is some conflict of authority, the prevailing rule being to enforce such statutes out of a spirit of comity, where they do not infringe upon the policy of the law of the forum.

In cases of death by wrongful act which comes within the rule last mentioned, the same conflict of authority exists, especially as to the extent to which the details of such statutes will be followed, if followed at all, in the state of the forum. This question was discussed in the recent case of Thorpe v. Union Pacific Coal Co., 68 Pac. Rep. 145. This was an action in Utah for wrongful death of a person in Wyoming. The statutes of the latter state giving a right of action in such cases, provide that the action must be brought in the name of the personal representative. The statutes of Utah provide that the heirs of the deceased are the proper parties plaintiff in such a

suit. The plaintiff in this case, though basing his action on the Wyoming statute, thought it necessary, in suing in Utah, to conform to the law of Utah as to the manner of bringing the suit, and brought the suit within the heirs of the deceased as parties plaintiff. The trial court, while admitting a right of action under the Wyoming statute, sustained a demurrer to the petition on the ground that the plaintiffs had no cause to action, holding that the question of who may sue in such cases is a matter of right and not of remedy. In affirming the judgment of the lower court, the Supreme Court of Utah said, in part as follows:

"There is no question that the action is transitory, or that it may be sustained by the courts of this state, if they acquire jurisdiction of the defendant. As a matter of comity, the statutes of one state, although not of extraterritorial force, will be recognized in proper proceedings by the courts of another. Comity will enforce rights regardless of where they arise, or whether of statutory or common-law origin, when not local in their nature, and not in contravention of the policy of the government of the tribunal. Comity, however, does not permit the courts of one state to disregard one provision of a statute of a foreign state whose language is unambiguous and its directions mandatory, for the purpose of enforcing another provision of the same statute under the procedure of the *lex fori*. When the legislature adopts and commands one form of action to enforce statutory liabilities, the courts have no right to substitute another. No doubt, there may be cases where the question as to who may sue is one of remedy merely, and is determinable by the law of the forum, — as where the question is whether an action shall be brought by an assignee in his own name or in the name of his assignor, and the like, — but where, as in this case, it is a matter of right, and the provisions of the statute fix the liability and confer the right to sue, it is otherwise."

As to the general right to base a right of action in cases of this kind on the statutes of a foreign state, the overwhelming weight of authority sustain the rule that where the statute in the state in which the injury is inflicted gives a right of action for death, the right may be enforced in another state having a similar statute. H. & D. R. R. v. McMullen, 117 Ind. 439, 20 N. E. Rep. 287; Knight v. Railroad, 108 Pa. St. 250; Win Tuska v. Railroad (Ky.), 20 S. W. Rep. 819; Bresenden v. Chamberlain, 53 Fed. Rep. 307; Nelson v. R. R., 88 Va. 971; Weaver v. R. R., 21 D. C. 499; Laird v. R. R., 62 N. H. 254; McLeod v. R. R., 58 Vt. 727; Morris v. R. R., 65 Iowa, 727; Railroad Co. v. Lewis, 24 Neb. 848; Railroad Co. v. Crudup, 63 Miss. 291; Railroad Co. v. Swint, 73 Ga. 651; Chandler v. R. R., 159 Mass. 589; Wooden v. Railroad, 126 N. Y. 10, 26 N. E. Rep. 1050, 22 Am. St. Rep. 803. *Contra:* Kahl v. Railroad, 95 Ala. 337, 10 South. Rep. 661. The rule announced by these later authorities is absolutely contrary to the rule announced by the overwhelming majority of the earlier cases. This absolute change from one position to one directly antagonistic could not be accomplished without introducing some confusion into the law as relating to this question. And this confusion to-day relates principally to matters of procedure. Thus, in Ohio, which formerly denied the extraterritorial enforcement of such statutes, now permit the enforcement of the statutes of such states as enforce the provisions of their own statute. In Missouri, the earlier decision practically did not permit an action of this character to be brought. Vawter v. Railway Co., 84 Mo. 679; Oates v. Railroad, 104 Mo. 514. A statute passed in 1891 permits such actions to be brought in that state even in the name of a personal representative appointed in another state. Wilson v. Tootle, 55 Fed. Rep. 211.

THE YOUNG BARRISTER IN COURT.

There is no law of nature by which the first public effort of a lawyer is foredoomed to failure. It is commonly assured that the best method of learning how to practice at the bar is to enter the lists and profit by the humiliating defeats you will there encounter. This presupposes a defeat; but the young barrister who begins his work with such an idea, belittles himself and injures his clients. With ripe preparation on the facts and intelligent insight into the law, the novice stands at least an equal chance of winning. It will be the purpose of the following suggestions to indicate how such preparation and insight may be secured.

The earliest intimation the practitioner will have of his cause will usually come from his client, who seeks his advice either as to the advisability of bringing suit or of maintaining a defense. Even the most uncouth and unlettered men have the faculty of imparting their version of a matter more clearly in their own rambling way than by answering an attorney's questions. They have turned it over repeatedly in their minds, and will tell you most, if not all, of the salient facts, if you permit them to take their own time and their own method. Hence, the lawyer must be prepared to sit, it may be for hours, listening carefully and with sympathy to a voluble account (sometimes interspersed with imprecations or with tears), and out of the mass of chaff he must extract the grain. When the client his told all he can remember and has fairly emptied himself of his case, you may then catechise him, sifting his statements and cross-examining him as vigorously as though

you were his antagonist. Thus you may often discover important facts which he has either neglected to mention or has intentionally concealed. Care is to be taken, however, not to appear to doubt the client's word and thus give mortal offense.

The purposes of this severe examination are, first, to ascertain if there is a probability, upon legal grounds, that a recovery can be had if suit is brought; and second, to determine whether it is advisable, under all the circumstances, to institute legal proceedings, assuming the suit would be successful. To learn the first point the attorney will have recourse to his stores of technical knowledge, and if he is at all in doubt he will frankly state that he needs time for considering the question and investigating the authorities. In determining the advisability of bringing suit, as a matter of policy, he will seek with all proper regard for his client's feelings to find out from him the situation of his family or business affairs and whether the institution of an action would in anywise jeopard his more important interests. He will particularly inquire respecting the solvency of the party against whom suit is to be brought, that he may not waste his own and his client's energies in attacking a man of straw. If the client be sued and consult his attorney as to his defense, the same minute examination will be necessary, for it is a common trait among litigants to believe they can prove their case without difficulty but that their adversary will be hampered by a failure of evidence at every step. The client will often undertake to provide you with ample proof of each fact material to his case, but you are never to rely upon that assurance. Parties to litigation, of all men, most readily believe that to be true which they wish were true. The attorney must be skeptical. This sifting process has a further value; not infrequently the client has reasoned out a plan of action or a series of arguments which will prove of real value to his counsel in fighting the battle. But the counselor will never forget that he alone is the commander-in-chief, and though he stands willing to avail himself of wise and practical suggestions or sound argument offered by his client, he never allows the legal opinions of a layman to override and direct the actions of a professional adviser.

Next in importance to consulting the client is interviewing the witnesses. To best accomplish this the attorney must know something of them before they are approached. Is their attitude in the case hostile or friendly to your side? Are they under any strong inducement to conceal facts or to distort and color them? Are they to be relied on implicitly or must we verify and corroborate all their statements? Are they liable to be tampered with by the adversary, or are they proof against all corrupt influence? What has been their moral history! These, among other facts, should be considered before the witness is approached, to the end that you may secure from him the most and the best proof he is capable of giving. What the manner of that approach will be must depend upon the character of the witness. If he is thoroughly reliable you may explain with some degree of fullness what your position is, but never to such an extent that, if he proves false, he can damage your case by betraying your plan of action to the enemy. A courteous and manly bearing, with a total absence of bravado and impudence will secure the best results. In your dealings with witnesses you will recall that most persons dread to testify in court, and among women this reluctance is almost universal. If it is evident that a particular person knows more than he will tell, and keeps silent in the hope that he may escape the ordeal of testifying, it will be necessary to argue the matter with him in a spirit of friendliness, and seek to overcome his fears or his prejudices by legitimate appeals to his interest and his sense of right and justice. You may secure the co-operation of an acquaintance to induce him to divulge what he knows. If all expedients fail, and you are confident he will not disclose the facts, it will generally be safest not to summon him as a witness, for his stubborn silence upon the witness stand will detract from your side of the controversy. On the other hand, you may find your witnesses suspiciously talkative; they know too much. You will therefore proceed with them, as with your client, sifting their knowledge, cross-examining them as your antagonist will probably do at the trial. You will have them narrate to you the details of the events about which they seem conversant. "Where did you stand when the accident occurred? Who else was there? Where had you been? Where, afterwards, did you go?

Was it daytime or dusk? To whom did you speak?" etc. Especially the attorney will seek to discover what are the sources of the witnesses' knowledge, whether it is derived from hearsay reports of third parties, or from personal observation, and if they are stating what they actually saw and did, or merely their conclusions and opinions founded upon the facts perceived.

You will not rest satisfied with interviewing all your own witnesses, but will try to see the adversary party and those whom he expects to call. This is liable to be a barren inquiry; still, valuable hints are sometimes dropped which will put you upon your guard against surprise. In the latter investigation you are to remember that it is unworthy of your profession to deceive the person interviewed into believing he is conversing with an ally or a friend. It is entirely legitimate, however, to study his demeanor and to question him closely in order to decide how he is to be dealt with on the trial. After the witnesses have been thus subjected to examination and study, it will be advisable to write down on separate sheets of paper what each one will testify to and indorse this abstract with the name of the case and of the witness. These are kept together and will prove of inestimable value at every stage of the litigation; for it frequently happens, after a lawyer has filled his mind with his case, there is a postponement until some remote time, and in the interval his memory loses its first vivid impressions of nice points and slights incidents. Where your evidence consists of documents, it is of prime importance that you see the document itself and not trust to another's recollection of its contents. Your personal inspection may reveal erasures and alterations which must be explained, fatal ambiguities or ruinous clauses and conditions. It will greatly assist you in mastering the facts to visit the place in which occurred the accident, crime or transaction in question. The judge and jury will be ignorant of the situation, and your own observation will enable you to be far clearer and more accurate in depicting the scene than will the study of diagrams and the reports of witnesses. After you have marshalled all the facts which you have gleaned from men, documents and localities, you will crystallize your information by reducing the whole to writing in narrative form, so that anyone, by reading your abstract, may derive a distinct and adequate idea of the case.

We shall suppose you are in full possession of the facts; you will now address yourself to the law applicable thereto. Much time will be saved by constructing a written outline of legal propositions involved and considering these strictly in order. Your tendency will be to select one branch of the case which appears peculiarly attractive, and make extensive preparation upon it, leaving your forces dangerously exposed at another and less interesting point. The only safe plan is that pursued by a general who arranges his hosts for battle; each part of the line must be well defended, there must be no gaps. Another seductive temptation will be to investigate the law on some subject very similar to the one you have in hand, yet not precisely your question. The mind often shows a desire to shoot a trifle outside the bull's-eye instead of in the exact center. Therefore must we restrain this unruly member and command it to investigate the very point which you have noted in your outline. For example, if you are inquiring whether a railroad company which has received goods for carriage from one who has stolen them, may detain them from the rightful owner until the transportation charges are paid, the mind by a natural perversity will tend to discover the law governing livery stable keepers, warehousemen, innkeepers and mechanics who detain stolen property under similar circumstances, until their charges are collected. These similar cases may subsequently be valuable by way of analogy, but your business now is to learn what rule governs railroad companies, and you are to bend your mind to that one task with a grip of steel.

But perhaps your powers are not accustomed to this kind of thinking; how are you to know what points of law to investigate and what is applicable to your case? Two species of preparation every lawyer expects to make; a general preparation resulting from his investigation during student days, and from those minute particles of law which he has since learned line upon line, precept upon precept, here a little and there a little, out of his reading, his conversation with lawyers, attendance at court and from actual experience in practice. Besides this stock of general working knowledge, which should grow larger and richer with every passing year, is the

special preparation required for each case. None but the shallowest of lawyers will ever trust to his general knowledge when a legal battle is to be fought. Hence, to discover the law points involved in your suit, summon the results of your general preparation; and in the light of all you know, see how the facts impress you *as a lawyer*, not as a philanthropist, a politician or a citizen. Where do the strong propositions lie? Where are the weaker? What is the natural, the rational and common-sense mode of looking at the case? What legal propositions are instantly suggested by the facts, as applicable to the cause? What are the peculiar features of the case which especially appeal to your legal sense of justice? Do these special features lead your mind toward further propositions? Are these propositions sound or fallacious? Which of them will appeal most strongly to a court? By thus catechising yourself your faculties will be roused into action and points and arguments will come trooping to your command. Up to this juncture your examination of the law governing your suit has been superficial and has been guided by your general preparation before referred to; now begin to read up on your case, holding your mind open to new impressions and suggestions. Here you will experience one of the keenest delights of practical legal study, when some chance remarks of a court or the facts of a reported case suddenly send a flash of light upon your inquiry and you see a bright, fresh argument of which you had not even dreamed. Read first your own state reports and statutes, for many young lawyers who have pursued their studies at an institution where reports of one particular state are most frequently cited, acquire an undue friendliness toward such reports and are reluctant to have recourse in the first instance to those of their own jurisdiction, preferring to begin their researches among cases far from home. In your investigations try to forestall your adversary's arguments and be prepared to meet and match them, since he is a poor lawyer who can see only one side of a case. Finally, when you have exhausted the law in your researches and have caught and chained every legal argument which the facts suggest or afford, cull out a few of the strongest, clearest and most convincing ones and throw your entire weight upon them, avoiding the folly of elaborating a long, involved argument in which you clutch at every straw and splinter that floats within your reach. By excessive division and subdivision you destroy the force of your own argument and it collapses by its own weight. You are bidding, not for the admiration of the court at your skill in constructing elaborate disquisitions, but for victory in the case. Let all hair-splitting and scholasticism go; give forth great masses of light and strive for strength, not prettiness; conviction, not ingenuity.

Thus far we have dealt with the argument on the *law* side of the controversy. Much the same method will be pursued in discovering arguments by which you seek to prove to the jury the existence or non-existence of some fact in dispute. You will never forget that you are addressing unlearned men, men who are unaccustomed to reason deeply or to hold a long train of arguments in their memories. What they can comprehend must be simply and plainly told. Ask yourself what arguments would appeal to the ordinary man, and use these rather than others which are fanciful and abstruse. Speak with a plan in your mind. Nothing is easier, for there are three great divisions under which may be included all you care to say in an argument upon the facts before courts or juries: first, the *right*, (the law of the case); second, the *wrong*, (a discussion of the evidence and what it proves); third, the *remedy*, (what verdict ought the jury to render in the light of the law and the facts)? Thus every case may be argued according to the syllogism, the major premise being "the law," the minor premise "the evidence," and the conclusion "the redress." The form of the whole argument is as follows: "The rule of law is this: the facts of the case are these, and bring it within the rule stated; therefore, the plaintiff is entitled to recover." Then let the advocate shut himself in his room and speak his entire argument aloud to an imaginary jury, exactly as he intends to deliver it in open court.

The young lawyer's bearing in the presence of judge and jury is a matter of no slight importance. Toward the judge he must conduct himself with the utmost deference, yet with firmness and a due regard for his client's rights, being neither overawed by the judge's greatness, nor filled with unconcealed contempt at his ignorance. If you are called to

face some Jeffries on the bench, who seeks to override law and lawyers, remember your personal dignity, that you are as much an officer of the court as is the judge; your interest in the case and your client's welfare; and thus emboldened stand firm with the respectful resolution of Erskine when he braved Lord Mansfield and pronounced his famous arraignment of the Earl of Sandwich, which won him his cause and his fame, and who afterwards said that he dared speak as he did because he felt his little children plucking him by his robe and saying, "Now, father, now is the time to get us bread!" Remember that the judge is unfamiliar with the case, and with much of the law pertaining to it, that your special preparation renders you far better acquainted with both the law and the facts than is he; that your duty is to assist him, and to that end you are to take nothing for granted; you are to watch for signs of especial interest on his part, and welcome interruptions which show at what points he is experiencing difficulty. Toward the witnesses it is well to preserve a friendly demeanor. It was said of the late Lord Russell that he could, at will, assume the most seductive Irish brogue when cross-examining an Irishman, and that few could resist the charm of this confidential and facinating mode of address. You are to watch with the utmost vigilance lest a shrewd witness entrap you on cross-examination, while you are seeking to ensnare him. It is reported that on one occasion a blustering and offensive attorney questioned his adversary's witness with vehement brutality. Finally he roared at him, "Haven't you been in prison?" "I have," replied the witness, with hesitation. "Now just tell the jury where you were imprisoned and what was your crime," triumphantly demanded the lawyer. "In Andersonville, and my offense was, fighting for my country." Juries are apt to sympathize with a witness whom they consider misused, and by making his cause their own will give him more credence than perhaps he deserves.

Whether examining your own or your adversary's witnesses use the simplest of language, and frame your inquiries in the fewest possible words. Verbose and involved questions confuse and confound even the best disposed. In examining an adverse witness see clearly what you wish to extract from him, but keep it far out of his sight. You must never fail to see it; he must never catch a glimpse of it. A skillful feat of this character is on record where a woman, terribly crippled in her limbs from some cause, sued a street railway company for occasioning her pitiable condition, asshe alleged, by suddenly starting the car while she was alighting. Counsel for the company brought out on her cross-examination that she was carrying a basket full of eggs at the time of her injury. He adroitly led her along until she told how many eggs she was carrying, where she went after the accident and what she did with the eggs. Finally when every egg has been accounted for and all had been sold, he successfully argued to the jury that as eggs are more easily broken than legs, and as all the former were in good, marketable condition after the accident, the latter were, in all probability, equally sound and good.

Toward opposing counsel your attitude should be courteous but unflinching, generous but not reckless in granting favors. You will avoid all personality so far as possible, never breaking into your opponent's address to the court or jury except when he is grossly misstating facts or misrepresenting you, and always dealing fairly with his arguments. Never enter upon a trial supposing your adversary is a fool, but rather overestimate his ability. This should serve to stimulate, not to embarrass your faculties. Whatever may be the riot of unrest within your bosom, you must bear a front as calm and inscrutable as if the day were already yours.

Toward the jury your demeanor should be manly and winning. They must be treated with deference and no slight is to be cast upon any class of men to which they may belong. They will not resent the utmost simplicity of statement, or the homeliest explanation of the law and the evidence, but if they conceive you are not in earnest or are misleading them, they will do the most embarrassing thing they can think of,—take out their watches and yawn while you speak. Look at them as individual men, not as "a jury." Know something of their separate histories if you can, and make them your confidential friends as you stand before them in argument. Look them straight in the face with an earnest "significant look." Do not be dismayed at seeing the eyes of one closing in slumber or another studiously avoiding your gaze. Speak

clearly, agreeably, forcibly and with a deep conviction of the truth of your utterances, and it may be said of you as of James Scarlett, Lord Abinger, the great verdict winner of England, that you possess a machine by which you make the heads of jurors move vigorously up and down in the plane of the perpendicular while your adversaries have only an imitation device which induces the jurymen to move their heads slowly from side to side.

HENRY M. DOWLING.

Indianapolis, Ind.

PHYSICIANS AND SURGEONS — LIABILITY OF GENERAL PRACTITIONERS AND SPECIALISTS FOR MALPRACTICE.

BAKER V. HANCOCK.

Appellate Court of Indiana. March 19, 1902.

A physician holding himself out as having special knowledge and skill in the treatment of particular diseases is bound to bring to the discharge of his duty to a patient employing him as such specialist, not merely the average degree of skill possessed by general practitioners, but that special degree of skill and knowledge possessed by physicians who are specialists in the treatment of such disease, in the light of the present state of scientific knowledge.

Robinson and Wiley, JJ., dissenting.

ROBY, J.: The complaint was in four paragraphs. In the amended first paragraph it was averred that the appellee was in March, 1897, engaged in the practice of medicine and surgery at Campbellsburg, Washington county, Ind.; that appellant was suffering from an ailment of the nose which he supposed to be nasal catarrh, and went to appellee for treatment; that appellee negligently examined appellant's nose, and told him that he had cancer of the nose, and advised him to have it treated at once, to which appellant consented; that appellee proceeded to treat the same, and negligently applied some local application to the plaintiff's nose, by and on account of which the end of his nose was eaten off; that he, in truth, never had cancer of the nose at all, and that his disfigured condition is the direct result of appellee's negligence and want of skill, on account of which he was damaged, etc., without fault on his part. The second paragraph of complaint differs from the amended first paragraph, in that it is therein averred that appellee held himself out to the public, by advertisement and otherwise, as a specialist in the treatment of cancer, and made the application to appellant's nose for the treatment of cancer. The third paragraph differs from the amended first paragraph only in averring that the local application referred to was for the treatment of cancer, and the fourth paragraph corresponds in substance with the second. The issue was formed by a denial. Appellant bases his claim in each paragraph upon the loss of part of his nose, which he says was caused by the negligent use of a local application by the appellee. It is tacitly admitted in the complaint, and expressly conceded in appellant's brief, that if the diagnosis of cancer was correct the charge of negligence in making the application, and the result thereof, fails. The question of liability therefore is restricted to very narrow limits. To make it out, the appellant produced evidence tending to show that he had no cancer; while the defense is based upon the testimony of appellee and others to show that he did have cancer of the nose. No charge of unskillfulness or lack of education is made in the complaint. It proceeds upon the hypothesis that the appellee did not exercise that degree of skill required of his profession. There is a recital in two of the paragraphs to the effect that appellant's injury was caused by the carelessness, negligence, and lack of skill and knowledge of the appellee. Such recital is not equivalent, and does not amount, to an averment of incapacity. It has relation to the preceding averments.

Whether or not appellee negligently failed to diagnose the disease, and so failing negligently made a local application, because of which appellant's nose was eaten off, is the main fact upon which liability was made to depend. Evidence relevant to that fact was admissible. Evidence not relevant thereto was not admissible to show liability, or to exonerate therefrom. The appellant offered four witnesses, in the first instance, by whom he undertook to prove that appellee had pronounced certain ailments of such witnesses to be cancer, and sought to treat, and in one case did treat, them for such disease. That the sores, so diagnosed as cancers, got well by the application of simple remedies. Objections were sustained by the court to the proof of such facts. These rulings were correct. "Facts relevant to the issue are facts from the existence of which inferences as to the existence of the facts in issue may be drawn." "Four classes of facts, which in common life would usually be regarded as falling within the definition of relevancy, are excluded from it by the law of evidence, except in certain cases: (1) Facts similar to, but not specifically connected with, each other. * * *" 1 Rice Ev. p. 490; Steph. Dig. Ev. art. 1; Reyn. Theory Ev. art. 10. There was no connection between the offered proof and the diagnosis and treatment given appellant. It was therefore collateral and inadmissible.

Appellee was allowed to testify, over objection, that during the past seven years he had treated 45 or 50 cases of cancer with the same remedy applied to appellant; that he had succeeded in his treatment of all but 10 per cent of them; and that such patients were old persons, whom he did not expect to cure. A witness introduced by appellee testified that he was a physician and surgeon; that he had occasion to examine a person named, and pronounced and believed her affection to be cancer; that appellee treated her in his presence, and that she recovered and remained well. Another doctor was allowed to state that

had examined the lip of another patient treated by appellee; that he diagnosed the affection as cancer, and that after the treatment by appellee the lip assumed its normal condition. Much other evidence was introduced of the same character, relating to the appellee's treatment of various other persons, and entirely disconnected from the treatment of appellant. It can make no difference as regards the admissibility of such evidence whether the result was good or bad. It is inadmissible in either event. The principle is illustrated by many cases. Evans v. Koons, 10 Ind. App. 603, 39 N. E. Rep. 350; Railroad Co. v. Wynant, 114 Ind. 525–529, 17 N. E. Rep. 118, 5 Am. St. Rep. 644; Gaar, Scott & Co. v. Wilson, 21 Ind. App. 91–104, 51 N. E. Rep. 502; Nave v. Flack, 90 Ind. 205, 46 Am. Rep. 205; Holtzman v. Hoy, 118 Ill. 534, 8 N. E. Rep. 832, 59 Am. Rep. 390; Thompson v. Bowie, 71 U. S. 463, 18 L. Ed. 423; Gillett, Ind. & Col. Ev. §§ 55, 56; Lacy v. Kossuth Co. (Iowa), 75 N. W. Rep. 689–692; Vansickle v. Shenk, 150 Ind. 417, 50 N. E. Rep. 381.

A further question is as to the measure of appellee's duty toward his patient. The measure of the duty of a general practitioner is that he does not undertake absolutely to cure, but is bound to possess and exercise the average degree of skill possessed and exercised by members of the profession practicing in similar localities (Gramm v. Boener, 56 Ind. 501; Smith v. Stump, 12 Ind. App. 359, 40 N. E. Rep. 279; Whitsell v. Hill [Iowa], 70 N. W. Rep. 750, 37 L. R. A. 830, and note; Becknell v. Hosier, 10 Ind. App. 6, 37 N. E. Rep. 580; Jones v. Angell, 95 Ind. 382; Kelsey v. Hay, 84 Ind. 89), and having regard to the advanced state of the profession at the time of treatment (Nelson v. Harrington, 72 Wis. 591, 40 N. W. Rep. 228, 1 L. R. A. 719, 7 Am. St. Rep. 900; Small v. Howard, 128 Mass. 131, 35 Am. Rep. 363; Almond v. Nugent, 34 Iowa, 300, 11 Am. Rep. 147; Smothers v. Hanks, 34 Iowa, 286, 11 Am. Rep. 141; Gates v. Fleischer, 67 Wis. 504, 30 N. W. Rep. 674; McCandless v. McWha, 22 Pa. 261; Tefft v. Wilcox, 6 Kan. 62; Hitchcock v. Burgett, 38 Mich. 501).

It is averred in two paragraphs of the complaint that the appellee "was making a specialty of the treatment of cancer, and held himself out to the public as a specialist in the treatment of said disease of cancer, by advertising in the public press, and by other public notices thereof." A specialist, as the term is here used, is understood to mean a physician or surgeon who applies himself to the study and practice of some particular branch of his profession. Scientific investigation and research have been extended and prosecuted so persistently and learnedly that the person affected by many forms of disease is of necessity compelled to seek the aid of a specialist, in order to secure the results thereof. The local doctor in many instances, himself suggests and selects the specialist whose learning and industry have given him a knowledge in the particular line which the general practitioner, in rural communities especially, has neither time nor opportunity to acquire. Small v. Howard, 128 Mass. 131. Being employed because of his peculiar learning and skill in the specialty practiced by him, it follows that his duty to the patient cannot be measured by the average skill of general practitioners. If he possessed no greater skill in the line of his specialty than the average physician, there would be no reason for his employment; possessing such additional skill, it becomes his duty to give his patient the benefit of it. The appellee, if he held himself out as a specialist in the treatment of cancer, was bound to bring to the discharge of his duty to patients employing him as such specialist that degree of skill and knowledge which is ordinarily possessed by physicians who devote special attention and study to the disease, its diagnosis and treatment, having regard to the present state of scientific knowledge. Feeney v. Spalding, 89 Me. 111, 35 Atl. Rep. 1027; McMurdock v. Kimlerlin, 23 Mo. App. 523. This is the degree of skill which by holding himself out as a specialist, he represented himself to have; and it does not lie with him to assert, after securing employment and compensation on that basis, that his representation was not true. The instructions given by the court upon this subject did not correctly express the law.

The judgment is reversed, and cause remanded, with instructions to sustain motion for a new trial, and further proceedings consistent herewith.

Comstock, C. J., and Black and Henley, JJ., concur.

NOTE.—*For What Degree of Care and Skill a Physician or Specialist May Be Held Liable.* — The correct rule as to the degree of care and skill required of physicians and surgeons is that a physician and surgeon, when employed in his professional capacity, is required to exercise that degree of knowledge, skill and care which physicians and surgeons practicing in similar localities ordinarily possess. Dunbauld v. Thompson, 109 Iowa, 199, 80 N. W. Rep. 324; Van Spike v. Potter, 53 Neb. 28, 73 N. W. Rep. 295. In McCracken v. Smathers, 122 N. Car. 799, 29 S. E. Rep. 354, it is held that a physician and surgeon holds himself out to possess, and will be held to apply, the degree of learning and skill ordinarily possessed by his profession existing at the time of his practice and not what may have existed prior thereto. And it was further held that the care and skill required is not that exercised by the profession in his particular neighborhood, but that exercised by his profession generally. He is not, however, an insurer of a cure. Logan v. Field, 75 Mo. App. 594; Ewing v. Goode, 78 Fed. Rep. 442. And it has also been held that in a suit for malpractice, a physician or surgeon is entitled to have his treatment tested by the rules of the school of medicine to which he belongs. Martin v. Courtney (Minn. 1899), 77 N. W. Rep. 813.

Where, as in the principal case, the physician makes a wrong diganosis, or through some mistake applies the wrong remedy or operates on the wrong member, the liability of the physician for malpractice is generally a question for the jury. So held where a surgeon, becoming confused, operated on the wrong leg of the patient. Sullivan v. McGraw, 118 Mich. 39, 76 N. W. Rep. 149. So, also, where defendant treated

plaintiff for a rupture of the ligaments, when in reality his kneecap was broken. Pike v. Honsinger, 155 N. Y. 201, 49 N. E. Rep. 760, reversing 32 N. Y. S. 1149, 84 Hun, 607. The court in reversing the lower appellate court said that the case should have been submitted to the jury to determine whether the defendant used the degree of learning and skill as was ordinarily possessed by physicians and surgeons in the locality where he practiced, and as is regarded by those conversant with the employment as necessary to qualify one to engage in it. Where, however, a physician, by the exercise of reasonable care and skill, ought to have discovered that an ailment was incurable, that it would not yield to the usual treatment, and that the patient could not be benefited by such treatment, he is guilty of negligence and malpractice for treating him. Logan v. Field, 75 Mo. App. 594. A peculiar case is recorded under the title of Harriott v. Plimpton, 166 Mass. 585, 44 N. E. Rep. 992. In that case a father employed a physician to examine a certain physical ailment of a young man seeking to marry his daughter. The physician mistakenly pronounced the disease venereal, resulting in the breaking off of the engagement. The physician was held liable in damages, notwithstanding the fact that information and not medical treatment was sought in his employment. In cases where a surgeon employs an unskillful assistant, the surgeons and assistants are jointly and individually liable for unskillful or negligent services of the assistant. Tish v. Welker, 7 Ohio N. P. 472, 5 Ohio S. C. P. Dec. 725.

As to the particular care and skill required of specialists, the authorities are not many. The definition of the word "specialist" is given in the Standard Dictionary as meaning "more especially a physician or surgeon who applies himself to the study and practice of some particular branch of his profession." Where one holds himself out as a specialist in medicine and undertakes to diagnose and treat cases coming within the specialty practiced by him, he is bound to use that degree of skill and care which such practitioners must reasonably and of necessity possess. Still, even this liability does not amount to an insurance. Thus, in an action against a physician who held himself out as a specialist in the treatment of the eye, to recover for an injury claimed to have been caused by him in performing an operation on the eye, a verdict for plaintiff was not warranted when there was no evidence of want of requisite knowledge, skill, or care on the part of defendant, and the evidence for the defense was positive and uncontradicted that the operation was a proper one, and was performed in a skillful and careful manner, and that it was a physical impossibility for it to have caused the injury complained of. Feeney v. Spalding, 89 Me. 111, 35 Atl. Rep. 1027. But when is a specialist a "specialist," within the meaning of this rule as to increased liability? In the opinion of the court in the principal case on a rehearing this question is answered. Baker v. Hancock, 64 N. E. Rep. 38. The court said, after propounding the question just stated: "The question is not one of law; it is a question of fact. The appellee may or may not have qualified himself as a specialist. Whether he had done so was a matter within his own knowledge, and primarily for his own determination. Having arrived at the conclusion that he possessed such qualification, it still remained optional with him as to whether he would hold himself out and receive and treat patients upon the basis of it. When he determines to do this and does it, it then becomes his duty to exercise that degree of skill which he thereby represented himself as possessing. To relieve one practicing medicine under such circumstances of responsibilities commensurate with the pretension by which patients are secured and compensation fixed, would be to give ignorant practitioners license to defraud and to place innocent patients at their mercy."

JETSAM AND FLOTSAM.

HOW HENRY CLAY WON A HOPLESS CASE.

In the days when Henry Clay was at his prime as a lawyer a man was once being tried for murder and his case looked hopeless indeed. He had without any seeming provocation murdered one of his neighbors in cold blood. Not a lawyer in the county would touch the case. It looked bad enough to ruin the reputation of any barrister. The man, as a last extremity, appealed to Mr. Clay to take the case for him. Every one thought that Clay would certainly refuse. But when the celebrated lawyer looked into the matter his fighting blood was roused, and, to the great surprise of all, he accepted.

Then came the trial, the like of which was never seen. Clay slowly carried on the case, and it looked more and more hopeless. The only ground of defense the prisoner had was that the murdered man had looked at him with such a fierce, murderous look that out of self-defense he had struck first. A ripple passed through the jury at this evidence.

The time came for Clay to make his defense. It was settled in the minds of spectators that the man was guilty of murder in the first degree. Clay calmly proceeded, laid all the proof before them in his masterly way. Then, just as he was about to conclude, he played his last and master card.

"Gentlemen of the jury," he said, assuming the fiercest, blackest look and carrying the most undying hatred in it that was ever seen, "gentlemen, if a man should look at you like this what would you do?"

That was all he said, but that was enough. The jury was startled and some even quailed on their seats. The judge moved uneasily on his bench. After fifteen minutes the jury filed slowly back with a "Not guilty, your honor." The victory was complete.

When Clay was congratulated on his easy victory, he said: "It was not so easy as you think. I spent days and days in my room before the mirror practicing that look. It took more real hard work to give that look than to investigate the most obtuse case."

WHAT CONSTITUTES "IMPRISONMENT."

Can a man be imprisoned without his own knowledge? That is one of the questions which was raised in the court of appeal in a recent case—Morris v. Atkins and Brooker, Times, March 22 and May 3 and 17. The plaintiff was a master mariner who, being assaulted twice in Regent's Canal Dock, Limehouse, and failing to receive satisfactory assurances from the dock police, determined to buy a revolver for his own protection. While in search of a gun-shop in the Minories he met Police-constable Brooker, with whom he entered into conversation. The policeman came to the conclusion that Captain Morris was insane. With the intention of humoring him, he invited the captain to come and tell his story to the inspector at the police station. With this invitation Captain Morris voluntarily complied, but the policeman admitted in cross-examination that if the plaintiff had refused to accompany him he would have used force, because he considered him to be a dangerous man. In the

charge-sheet the plaintiff was said to have been "taken in custody" and charged by the constable with "wandering apparently insane in the Minories." In the occurrence book, which was entered up by Inspector Atkins immediately after the incident, the defendant was stated to have been "brought in by Police-constable Brooker and charged by the police-constable with wandering apparently insane in the Minories." Next morning, when the plaintiff was charged by the police-constable at the mansion house police court with being a wandering lunatic, he said that he "took" the plaintiff to the station. It was admitted by the defendants at the trial that the plaintiff was in custody almost immediately after he entered the police station, though the plaintiff himself did not know his condition till he found himself in Bow Workhouse Infirmary. Under the circumstances, at what moment can it be said that the plaintiff's "imprisonment" began? Does the fact that he did not know he was in custody alter the real state of affairs which existed?

The jury found on the evidence given above, that though the plaintiff thought he accompanied Police-constable Brooker voluntarily to the police station, the policeman had, in fact, apprehended him in the Minories, and returned a verdict for the plaintiff with 75*l.* damages. The court of appeal have now reversed that finding on the ground that there was no "reasonable" evidence to justify it in face of the statement of the plaintiff. If the ignorance of the plaintiff of his real condition is the determining element, then the plaintiff was not in fact imprisoned till he was in the workhouse infirmary. The defendants themselves admitted that the plaintiff was in custody long before that, but if the court of appeal is right, imprisonment only dates from the moment the person apprehended becomes aware of it. But surely imprisonment is a fact, and not a psychological problem. It is a matter essentially for a jury to determine, and no evidence could be more "reasonable" than contemporary entries and statements made before any thought of an action at law had arisen.—*Justice of the Peace.*

HUMORS OF THE LAW.

Tess—Why on earth has Miss Ann Teek subscribed to all those legal journals?

Jess—Some one told her that proposals were printed in them.

Friend—Don't look so blue. You have a good case.

Jimson—No use. I'll lose. I know I'll lose. Every man on that jury either rented or bought a house of me when I was in the real estate business.

A lawyer received a new client the other day, a big man named Frazier, who wanted to sue to recover £500 advanced on a note and not repaid.

"Who is the client?" asked the lawyer.

"Oh, she's a relation of mine."

"How nearly related?"

"Very nearly?"

"But, my dear sir," persisted the lawyer, "you must be more explicit."

"Well, she may be my mother-in-law."

"May be? Then you are likely to marry her daughter?"

"I've already married the daughter."

"Oh, then, of course, the defendant is your mother-in-law?"

"I guess you'd better hear the whole story," said the man named Frazier.

He heaved a weary sigh and then went on: "You see, a year ago we lived together, my son Bill and I. Across the way lived the widow Foster and her daughter Mary. Well, sir, I married Mary because she was good-looking. My son Bill married the widow because she had heaps of money. Now, perhaps you can tell me whether the old lady is my mother-in-law or my daughter-in-law."

But the lawyer couldn't—at least, not just then. The problem had struck him all in a heap. He looked wild-eyed and his brain was reeling.

"Perhaps, when you've settled that question you'll undertake my suit," Frazier added. "The old lady borrowed the money fair and square, and she can pay it back; but she won't, so I've got to sue."

"I—I don't think I'll take your case," faltered the lawyer. "The case—er—er presents too many complications."

"By the way," said Frazier, disappointedly, as he took up his hat and prepared to go, "since the double wedding a child has been born to each couple. Can you tell me what relation the two children are to each other?"

But the lawyer couldn't.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ACCORD AND SATISFACTION — Release. — Where a debtor owes a judgment and note, and there is also an unsettled account, the receipt by the creditor of a sum less than the amount of the judgment, in "release of all claims, notes, judgments, demands, and accounts due," satisfies such judgment. — Little v. Koerner, Ind., 63 N. E. Rep. 766.

2. ADVERSE POSSESSION—Right to Maintain Fences.—Owners of land who have maintained fences since 1874 on the established line of a highway may enjoin a road supervisor and the county from moving the fence upon their land, though they agreed to be bound by the location of the section corner. — McDougal v. Popken, Iowa, 89 N. W. Rep. 1080.

3. AFFIDAVITS— Probative Force. — Affidavit held to aver only affiant's deduction from documents, and therefore to have no probative force ;construction of the documents being for the court.— Burns v. Boland, 75 N. Y. Supp. 700.

4. ANIMALS—Assessment of Damages. — Under Code, § 2317, a person distraining animals damage feasant can-

not retain possession of them without having the damage assessed as provided. — Holaman v. Marsh, Iowa, 90 N. W. Rep. 82.

5. APPEAL AND ERROR—Amendment.—Where a judgment is amended, an appeal within six months after the amendment, though more than six months after original judgment, is in time. — Hayes v. Silver Creek & P. Land & Water Co., Cal., 68 Pac. Rep. 704.

6. APPEAL AND ERROR — Contributory Negligence.— In an action for injuries caused by negligence a verdict for plaintiff will not be set aside, where the evidence is not conclusive that as matter of law she was guilty of contributory negligence.—Coonen v. American House Furnishing Co., Minn., 89 N. W. Rep. 1130.

7. APPEAL AND ERROR—Discretion of Court. — An application to set aside a decree and allow the introduction of evidence on a technical point is addressed to the discretion of the court, and cannot be reviewed. — Enyart v. Moran, Neb., 89 N. W. Rep. 1045.

8. APPEAL AND ERROR—Disputative Remarks by Trial Judge. — Where the remarks of the trial judge in reviewing the evidence were more disputative than judicial, but were not calculated to misrepresent the facts or prejudice the jury, it is no grouud for reversal.—*In re* Reed's Estate, Minn., 90 N. W. Rep. 319.

9. APPEAL AND ERROR—Evidence. — Error in excluding answer of witness held not prejudicial, when the matter was covered by the witness before his examination was concluded.— Swanson v. Keokuk & W. R. Co., Iowa, 89 N. W. Rep. 1088.

10. APPEAL AND ERROR— Failure to Comply With Order.—Where, pending an appeal from justice to district court, defendant failed to comply with order of the court, and was denied the privilege of introducing any evidence because of such failure, any error in striking his answer from the files was harmless. — Jenkins v. Myatt, Neb., 89 N. W. Rep. 1028.

11 APPEAL AND ERROR—Malicious Prosecution. — In an action for malicious prosecution, an instruction on exemplary damages, that if defendant, in instituting the prosecution, was actuated solely by feelings of personal malice against the "defendant," etc., was so misleading, on account of the mistake in using the word "defendant" for "plaintiff," as to require reversal. — Flam v. Lee, Iowa, 90 N. W. Rep. 70.

13. APPEAL AND ERROR — Motion for New Trial. — A judgment will not be reversed for errors required to be assigned on motion for a new trial, unless the petition in error shows that the court erred in overruling the motion.—Achenbach v. Pollock, Neb., 90 N. W. Rep. 304.

14. APPEAL AND ERROR — Motion to Modify Injunction. — The right to cross-examine affiants, whose affidavits were offered in support of a motion to modify an injunction, is within the discretion of the trial court, and its denial will not be reviewed. — Union Terminal Co. v. Wilmar & S. F. Ry. Co., Iowa, 90 N. W. Rep. 92.

15. APPEAL AND ERROR — Motion to Strike Out Answer. — Where no execution is taken to a ruling sustaining a motion to strike out the answer, an exception to the judgment on defendant's failure to answer further does not authorize a review of the motion. — Haddock v. Holman, Iowa, 89 N. W. Rep. 1100.

16. APPEAL AND ERROR—Negligence.— Where the jury have determined that a defendant was not negligent, the question of contribntory negligence is immaterial. — Scheel v. City of Detroit, Mich., 90 N. W. Rep. 274.

17. APPEAL AND ERROR—Personal Injuries. — Though in an action against a railroad company for injuries sustained by a passenger, the greater number of witnesses support defendant's theory of the manner in which the injuries were received, on appeal the supreme court cannot weigh the preponderance of evidence.—Pence v. Wabash R. Co., Iowa, 90 N. W. Rep. 59.

18. APPEAL AND ERROR — Photographs as Evidence.— In an action by a wife for selling intoxicating liquor to her husband, admission of photographs showing his crippled condition was not reversible error, where the jury also had a personal view of his injuries. — Faivre v. Manderschied, Iowa, 90 N. W. Rep. 76.

19. APPEAL AND ERROR — Receiver's Account. — The rule that the court will not disturb the findings of the trial court applied to an order allowing a receiver's account against objections charging him with positive fraud.— Minneapolis Trust Co. v. Menage, Minn., 90 N. W. Rep. 3.

20. APPEAL AND ERROR—Record. — Where the record does not contain a transcript from the journal of the district court of an alleged order, its absence is not supplied by a recital in the bill of exceptions, certified to by the court reporter, if the judge certifies that the recital is false and orders it stricken out. — Saussay v. William J. Lemp Brewing Co., Neb., 89 N. W. Rep. 1048.

21. APPEAL AND ERROR—Suit on Supersedeas Bond.— Where a judgment debtor has died pending appeal, the judgment creditor is not required, on the affirmance, to look to the estate of the deceased before maintaining a suit on the *supersedeas* bond.—Palmer v. Caywood, Neb., 89 N. W. Rep. 1034.

22. APPEAL AND ERROR—Tax Deed.— Decision on former appeal, sustaining tax deed, construed, and held not to prevent consideration of another defect on subsequent appeal. — Wine v. Woods. Ind., 63 N. E. Rep. 759.

23. APPEAL AND ERROR—Transfer for Benefit of Creditors. — A married woman, joining her husband in the execution of a trust deed for the benefit of creditors, held estopped from alleging other claims than those scheduled. — Gates v. Union Trust Co., Mich., 90 N. W. Rep. 45.

24. ASSAULT AND BATTERY—Costs.—3 Comp. Laws 1897, § 11,258, relative to costs in action for assault, applies where the action is against the master of the servant committing the assault.— Johnson v. Detroit, Y. & A. A. Ry., Mich., 90 N. W. Rep. 274.

25. ASSAULT AND BATTERY—Trespass Quare Clausum. —In an action for assault and battery, it was not error to allow defendant, before verdict, to amend his answer by alleging that he was acting in defense of his property. — Hannabalson v. Sessions, Iowa, 90 N. W. Rep. 93.

26. ASSIGNMENT FOR BENEFIT OF CREDITORS — Appraisal of Property — An irregularity in appraisal of property sold by a trustee for benefit of creditors, in that the property, which consisted of several items, was appraised as an entirety, was not ground for setting aside the sale, where the court found that the property sold for all it was worth.—Ohio & I. Oil Co., 63 N. E. Rep. 763.

27. ATTORNEY AND CLIENT— Disbarment. — While the supreme court has authority to suspend an attorney, except in exceptional cases, disbarment proceedings should be initiated in the district court, as provided by Rev. Codes 1899, §§ 434, 437. — *In re* Freerks, N. Dak., 90 N. W. Rep. 265.

28. ATTORNEY AND CLIENT — Fraudulently Misleading the Court.—Evidence held to show that, in procuring a judgment to be entered, an attorney was guilty of deceit, whereby the court was misled and fraudulently induced to enter a judgment which it had not directed to be entered. — *In re* Freerks, N. Dak., 90 N. W. Rep. 265.

29. BANKRUPTCY — Mortgaged Property. — Property subject to a mortgage held properly included in determining a debtor's insolvency, under Bankr. Act 1898 § 1, subd. 15.—Posey v. McManis, Tex., 67 S. W. Rep. 792.

30. BANKS AND BANKING—Appropriation of Depositor's Funds —A bank can appropriate the funds of a depositor to a debt due from him, unless the bank knows that it is a trust fund. — Globe Sav. Bank v. National Bank of Commerce, Neb., 89 N. W. Rep. 1030.

31. BANKS AND BANKING—Depositor.—A depositor in an insolvent bank may set off the deposit standing to

his credit when the bank closed its doors against his notes, payable to the bank, but not then due.—Thompson v. Union Trust Co., Mich., 90 N. W. Rep. 294.

32. BILLS AND NOTES—Authority of Agent.—One who pays a note to a third person, who is not in possession of it, at a place other than the place of payment, assumes burden of proving that the person was empowered to collect the money.—Lay v. Honey, Neb., 89 N. W. Rep. 998.

33. BILLS AND NOTES—Consideration.—A note given to an agent by his principal, in settlement of the agent's claims under the contract of agency, was based on a sufficient consideration, though the contract itself provided that the agent might terminate it at any time after 90 days from its date, and his election to terminate it may have been premature.—Barger v. Farnham, Mich., 90 N. W. Rep. 281.

34. BILLS AND NOTES—Effect of Indorsement of Non-Negotiable Paper.—An indorsement on a non-negotiable note merely operates to transfer the title, and does not make the indorser liable in case of non-payment of the maker.—Barger v. Farnham, Mich., 90 N. W. Rep. 281.

35. BILLS AND NOTES—Illegal Consideration.—Objection that a note was void because a part of the consideration was to suppress a criminal prosecution, and to suppress evidence in a pending prosecution, was bad, where the plea contained no notice of such a defense.—Barger v. Farnham, Mich., 90 N. W. Rep. 281.

36. BRIDGES—Unguarded Approach.—Whether a city had failed to properly maintain barriers on the sides of an embankment leading to a bridge and used as a public highway held a question for the jury.—Grant v. City of Brainerd, Minn., 90 N. W. Rep. 307.

37. BROKERS—Agent's Authority.—A real estate agent's authority in the sale of a farm held to go no further than to produce a buyer, and not to entitle him to enter into a contract of present sale in his principal's name.—Balkema v. Searle, Iowa, 89 N. W. Rep. 1087.

38. BROKERS—Commissions.—A real estate agent, employed to find purchaser for land, is entitled to commissions if he does so, though the seller does not know he sent the purchaser to him.—Rounds v. Allee, Iowa, 89 N. W. Rep. 1098.

39. BROKERS—Purchase of Property.—Where a real estate agent induces the owner to fix a net price on certain property for a sale to a third person, he cannot himself purchase the property and realize a greater profit than a reasonable commission.—Merriam v. Johnson, Minn., 90 N. W. Rep. 116.

40. BUILDING AND LOAN ASSOCIATIONS—Maturity of Stock.—The shares of a building association held to mature when the sum of all payments thereon, together with profits apportioned to them, amounted to $100 per share.—Racer v. International Building & Loan Assn., Ind., 63 N. E. Rep. 772.

41. BUILDING AND LOAN ASSOCIATIONS—Value of Stock.—In determining the value of the stock of a building association, to apply it on a mortgage of a stockholder, it will be taken to at least equal the sum of stock payments and declared dividends.—People's Building, Loan & Savings Assn. v. Gilmore, Neb., 90 N. W. Rep. 108.

42. CARRIERS—Action for Conversion.—In an action against a carrier for conversion of goods shipped, where the defense is seizure under legal process, the carrier must show process was valid on its face and must notify the shipper of the proceedings.—Merz v. Chicago & N. W. Ry. Co., Minn., 90 N. W. Rep. 7.

43. CARRIERS—Detached Wrong Coupon.—Where the conductor on a railroad detached the wrong coupon from a return trip ticket, leaving the passenger coupon which by their terms were not good for the return trip, and the passenger was ejected on the return trip, and took the next car, paying fare, he can recover only the extra fare so paid.—Brown v. Rapid Ry. Co., Mich., 90 N. W. Rep. 290.

44. CARRIERS—Lien on Property.—A lien on property acquired by a draft with bill of lading attached held not released by a guaranty that the draft would be paid.—Shaffer v. Rhynders, Iowa, 89 N. W. Rep. 1099.

45. CARRIERS—Passenger's Baggage.—Evidence in an action for the value of merchandise shipped as baggage held to authorize an inference that defendant railroad had knowledge of the nature of the contents of the trunks, so that a verdict for plaintiff would not be disturbed.—Amory v. Wabash R. Co., Mich., 90 N. W. Rep. 22.

46. CERTIORARI—To Vacate Judgment.—In *certiorari* to vacate a judgment on a transcript in the circuit court from a justice's judgment, the petitioner held to have failed to show that justice required the issuance of the writ.—West v. Parkinson, Mich., 90 N. W. Rep. 27.

47. CHARITABLE HOSPITALS—Liability for Negligence of its Surgeons.—A hospital organized to carry out a charitable trust is not liable for injuries to patients resulting from the negligence of the surgeons in charge.—Pepke v. Grace Hospital, Mich., 90 N. W. Rep. 278.

48. CHARITIES—Cemeteries.—A deed conveying land to trustees for cemetery purposes held to impliedly authorize the trustees to make sales of small parcels of the land for the benefit of the cemetery.—City of Tacoma v. Tacoma Cemetery, Wash., 68 Pac. Rep. 723.

49. CHARITIES—Orphan Asylum.—The fact that an orphan asylum was not within the corporate limits of a certain city held not to prevent it from taking a bequest to an orphan asylum "in" the city.—Old Ladies' Home of Muscatine v. Hoffman, Iowa, 89 N. W. Rep. 1066.

50. CHATTEL MORTGAGES—Attachment.—Where an attachment was levied on mortgagor's interest in personalty after default, and possession delivered to mortgagee, he could sue an attachment bond and recover whatever damages he had sustained, notwithstanding mortgagee had recovered judgment against attachment plaintiff for conversion of identical property which had been paid.—Jencks v. Murphy, S. Dak., 89 N. W. Rep. 1121.

51. CHATTEL MORTGAGES—Flour Mill.—Where the owner of a mill gives a chattel mortgage on the same, he is estopped to deny that the mortgaged property is personalty.—Gordon v. Miller, Ind., 63 N. E. Rep. 774.

52. CHATTEL MORTGAGES—Foreclosure.—An agreement in a chattel mortgage, in addition to its general provisions, that "the mortgagee shall take immediate possession and sell the property at retail or wholesale," does not preclude the mortgagee from resorting to the statutory remedy by foreclosure at public sale.—Pettee v. John Deere Plow Co., Okla., 68 Pac. Rep. 735.

53. CONSTITUTIONAL LAW—Public Lands.—Lands of the United States at the date of the swamp land act of 1850, approved by the officers of the general land department as lands of the character intended to be granted thereby, were by such act segregated from the public domain and vested in the state.—Diana Shooting Club v. Lamoreaux, Wis., 89 N. W. Rep. 880.

54. CONTINUANCE—Matter of Right.—Where the issues in an action are regularly made up, a party thereto will not be granted a continuance as a matter of right on the ground that the issues were formed sooner than he anticipated.—Palmer v. Caywood, Neb., 89 N. W. Rep. 1034.

55. CORPORATIONS—Liability of Stockholders.—Under Comp. Laws 1897, § 7057, a stockholder in an insolvent corporation is liable to a creditor thereof to the amount that dividends received by him reduced the capital stock.—American Steel & Wire Co. v. Eddy, Mich., 89 N. W. Rep. 952.

56. CORPORATIONS—Stockholders Liability.—Under Laws 1897, ch. 341, extending the power given by Gen. St. 1894, ch. 76, to creditors to enforce the liability of stockholders to assignees, and requiring an action by an assignee, if no similar action has been commenced within six months of the assignment, held, that the fact

that such a suit is pending must be taken advantage of, in an action by an assignee, by special demurrer or answer.—Somers v. Dawson, Minn., 90 N. W. Rep. 119.

57. CORPORATIONS — Street Railway Consolidation.—Where a street railway company was composed of an actual consolidation of other companies, and has received and retains all their properties, it cannot deny its liability on a debt due by one of such former companies on the ground that such consolidation was illegal.—Shadford v. Detroit, Y. & A. A. Ry., Mich., 89 N. W. Rep. 960.

58. COSTS—Briefs.—Costs for printing briefs will not be allowed on a reversal, appellant not having complied with the rule for setting out all the instructions in the abstract.—Brinkley Car Works & Mfg. Co. v. Cooper, Ark., 67 S. W. Rep. 752.

59. COUNTIES—Sale of Land.—Where deeds of county were void, owing to purchaser having paid sum insufficient to authorize conveyance, and purchase money was used by county, purchaser held entitled to recover for money had and received.—Rice v. Ashland County, Wis., 89 N. W. Rep. 908.

60. COUNTY SEATS—Removal of Offices.—Where, in an action to compel the officers of the county to return their offices to the county seat, after they had been moved pursuant to a void election, an allegation in the answer that suitable rooms and vaults could not be obtained there is not sustained, the evidence discloses no substantial change in the conditions in the county seat where the offices were situated for 10 years before the removal.—State v. Porter, S. Dak., 89 N. W. Rep. 1012.

61. COURTS — Prerogative Writ. — The supreme court will, on an application for a prerogative writ, judge for itself whether the wrong complained of is one which demands the interposition of the court, and leave to issue the prerogative writ should in such cases be applied for by the attorney general.—Duluth Elevator Co. v. White, N. Dak., 90 N. W. Rep. 12.

62. COURTS—Right to Procure Furniture. — The supreme court possesses the inherent power to procure, at the expense of the state, suitable furniture for its court room.—State v. Davis, Nev., 68 Pac. Rep. 689.

63. CREDITORS' SUIT—Fraudulent Conveyance.—Where an execution has been levied on real estate fraudulently conveyed, the execution creditor held entitled to proceed in equity to set the fraudulent conveyance aside and enforce his lien.—Howard v. Raymers, Neb., 89 N. W. Rep. 1004.

64. CREDITORS' SUIT—Right to Intervene —Where interveners in a creditors' suit claim under an execution levy subsequent to a levy and sale by the complainants, which they attempt to set aside as made while the property was in possession of a receiver, it is proper to allow them to intervene to preserve their rights.—Campau v. Detroit Driving Club, Mich., 90 N. W. Rep. 49.

65. CRIMINAL EVIDENCE — Testimony as to Part of Conversation.—It was not error to permit a witness to testify to a part of a material conversation, when he did not profess to be able to testify to the entire conversation.—People v. Rader, Cal., 68 Pac. Rep. 707.

66. CRIMINAL LAW—Appeal.—Where, before the court had a chance to consider an appeal by one convicted of larceny, appellant's term of imprisonment expired, the judgment would be affirmed.—State v. Garrety, Iowa, 90 N. W. Rep. 76.

67. CRIMINAL LAW—Burglary.—An information charging the commission of burglary in the nighttime is not sufficient to sustain a conviction for burglary committed in the daytime.—People v. Smith, Cal., 68 Pac. Rep. 702.

68. CRIMINAL LAW—Directed Verdict.—A refusal to direct a verdict when proper exception is taken and presented in the bill of exceptions, held properly before the supreme court on appeal.—Lawless v. State, Wis., 89 N. W. Rep. 974.

69. CRIMINAL TRIAL—Errors in the Charge.—It was the duty of counsel to call attention to obviously unintentional misstatements of verbal errors in the charge, if deemed misleading.—State v. Lewis, Minn., 90 N. W Rep. 318.

70. CUSTOMS AND USAGES — Real Estate Broker.—Where the broker acting for one of the parties to an exchange of land was his agent, an offer to prove a general custom among brokers acting for both parties to an exchange to charge commissions of each was properly refused.—Dartt v. Sonnesyn, Minn., 90 N. W. Rep. 115.

71. DAMAGES—Penalty.—Where a contract for cutting, floating, and booming logs requires payments in installments as the work progresses, but reserved a portion of the compensation till full performance, the portion so reserved is a penalty, and not liquidated damages.—Kerslake v. McInnis, Wis., 89 N. W. Rep. 895.

72. DAMAGES—Failure to Harvest at Agreed Time.—Loss of grain by shelling, caused by appellant's failure to harvest at the time agreed, held not so remote and speculative as to preclude recovery.—Holt Mfg. Co. v. Thornton, Cal. 68 Pac. Rep. 708.

73. DEEDS—Date of Contract.—A delivery of a deed dated on the day of the contract for sale by operation of law relates back to its date.—Cummings v. Newell, Minn., 90 N. W. Rep. 311.

74. DESCENT AND DISTRIBUTION—Object of the Statute. —It is the object of the statute of descent to cut off inheritance *per stirpes* among collaterals, and those nearest in degree take the estate to the exclusion of those more remote.—Clary v. Watkins, Neb., 89 N. W. Rep. 1042.

75. DISTRICT AND PROSECUTING ATTORNEYS—Disbarment.—A state's attorney, who renders professional assistance to defendant, in a criminal trial, violates his duties as state's attorney, and as attorney at law.—*In re* Voss, N. Dak., 90 N. W. Rep. 15.

76. DIVORCE — Allowance of Alimony.—Where a motion for additional alimony in anticipation of appeal does not allege that defendant had expended what has been allowed pending suit, the ruling on the motion cannot be reviewed.—Motley v. Motley, Mo., 67 S. W. Rep. 741.

77. DIVORCE—Right to Administer.—A son of a deceased, claiming no property rights under a decree of divorce, held not estopped in a proceeding by a subsequent wife, contesting his right to administer the estate, to impeach the validity of the decree on the ground of want of jurisdiction of the court granting it. —Burge v. Burge, Mo., 67 S. W. Rep. 703.

78. DRAINS—Certiorari.—Under a statute providing that notice of *certiorari* shall be served on a drain commissioner within ten days after his determination, an application for *certiorari* made over two months after such determination comes too late.—Blumfield Tp. v. Brown, Mich., 90 N. W. Rep. 284.

79. DRAINS—Conclusiveness of Findings.—The finding of the special commissioners, or of a jury appointed under the statute, on the question of the necessity of a drain, is as conclusive on the courts as is the verdict of a jury on conflicting evidence.—Swan Creek Tp. v. Brown, Mich., 90 N. W. Rep. 38.

80. EASEMENTS—Right of Way.—A grantee's right of way by necessity over the grantor's land held unaffected by prior contract for sale of the servient estate, of which the grantee had no notice.—Fairchild v. Stewart, Iowa, 89 N. W. Rep. 1075.

81. ESTOPPEL — Laches.—Evidence considered, and held, that a former holder of a share in a mining lease and option, which had been sold for non-payment of assessments, was estopped by laches from objecting to irregularities, if any, in the sale.—Joseph v. Davenport, Iowa, 89 N. W. Rep. 1081.

82. ESTOPPEL—Mortgaged Property —The owner of insured property, when sued on a mortgage note, held not entitled to set off the latter's failure to collect the insurance on the mortgaged property.—Breckenridge v. White, Mo., 67 S. W. Rep. 715.

83. ESTOPPEL—Void Assessments.—Where a deed covenants against incumbrances, except taxes and assessments, which the grantee assumes, where nothing on that account was deducted from the purchase price, the grantee is not estopped from defending against the payment of illegal void assessments.—Orr v. City of Omaha, Neb., 90 N. W. Rep. 301.

84. EVIDENCE—Bills and Notes.—Parol evidence was permissible to determine whether parties signing their names on the back of a note signed as indorsers or joint makers.—Barger v. Farnham, Mich., 90 N. W. Rep. 281.

85. EVIDENCE—Claim by Surviving Partner.—A surviving partner, qualifying as administrator of a partnership estate on affidavit that his deceased partner owned a half interest in a certain fund, cannot, after collection of the claim, assert that it was never a part nership claim.—Cogswell's Heirs v. Freudenau, Mo., 67 S. W. Rep. 744.

86. EVIDENCE—Effect of Fire on Green Hedges.—It was error to refuse to permit a witness to state whether fire would kill a green hedge, when he had testified that he had had experience with hedges, and had observed the effects of fire on them.—Swanson v. Keokuk & W. R. Co., Iowa, 89 N. W. Rep. 1088.

87. EVIDENCE — Grantor's Intention.—Parol evidence of the attorney who drew a deed as to the grantor's intention held inadmissible, where the language of the deed brought the same within the rule in Shelley's case.—Johnson v. Morton, Tex., 67 S. W Rep. 790.

88. EVIDENCE—Indications of Pain.—Evidence of exclamations, shrinkings, and other expressions of a plaintiff in an action for injuries, made while being examined by a physician for the purpose of qualifying such physician as a witness, held admissible, where they appear to be spontaneous.—Missouri, K. & T. Ry. Co. of Texas v. Johnson, Tex., 67 S. W. Rep. 768.

89. EVIDENCE—Res Gestæ—In an action against a railroad company for injury claimed to have resulted from the negligent operation of a train, testimony as to statements relating to the accident, made by the fireman or engineer within six minutes thereafter, is admissible.—San Antonio & A. P. Ry. Co. v. Gray, Tex., 67 S. W. Rep. 763.

90. EVIDENCE — Services by Child.—Where a father is not shown to have requested his daughter to write a letter to a son, requesting the latter to come home, or to have had any knowledge of the letter, the letter is not admissible in an action by the son against the father's estate for services rendered after his return.—Donovan v. Driscoll, Iowa, 90 N. W. Rep. 60.

91. EXECUTORS AND ADMINISTRATORS—Appeal from Final Accounting.—The surviving husband of a decedent held entitled to appeal from the final accounting of the administrator; he being "affected" thereby, within Comp. St. ch. 20, § 42.—*In re* Gannon's Estate, Neb., 89 N. W. Rep. 1028.

92. FEDERAL COURTS — Venue of Cause.—The requirement that suits in federal courts against citizens of other states shall be brought in the district of their residence is a mere personal privilege, which a defendant may waive, and is not a question of jurisdiction.—State v. Frost, Wis., 89 N. W. Rep. 915.

93. FIXTURES—Flour Mill.—A flour mill on leased premises, which may be removed without permanently injuring the freehold, held personalty, and subject to mortgagee as such.—Gordon v. Miller, Ind., 63 N. E. Rep. 774.

94. FIXTURES—Unity of Title and Ownership.—The nature of the annexation, and the reservation of title till the payment of the purchase price, of machinery annexed to real estate, held to prevent it from becoming part of the realty.—Schellenberg v. Detroit Heating & Lighting Co., Mich., 90 N. W. Rep. 47.

95. FORECLOSURE — Trade Fixture.—The purchaser of a lessee railroad company's property from its receivers was not estopped, by a decree of foreclosure of a mortgage on the leased premises, from removing a trade fixture erected after the foreclosure decree and before the mortgage sale, though the lessee was a party to the foreclosure.—Union Terminal Co. v. Wilmar & S. F. Ry Co., Iowa, 90 N. W. Rep. 92.

96. FRAUDULENT CONVEYANCES—Creditor's Suit.—The burden is on the plaintiff in a suit to set aside a fraudulent conveyance, of showing a judgment in the county where the land is situated, based on an indebtedness existing at the time of the conveyance.—State Ins. Co. v. Prestage, Iowa, 90 N. W. Rep. 62.

97. HUSBAND AND WIFE — Deposit in Joint Name.—Declarations by a husband, on depositing money in the name of himself and wife, that the money was his, held self-serving declarations, not admissible in an action against his executor by the wife's administrator to recover her interest therein.—Armstrong v. Johnston, Mo., 67 S. W. Rep. 733.

98. HUSBAND AND WIFE—Extra Work by Contractor.—Where a subcontractor, in painting defendant's house, at the request of his wife did extra work he cannot recover therefor in the absence of evidence that the wife was authorized by defendant.—Ross v. Dunn, Mich., 90 N. W. Rep. 296.

99. INSOLVENCY—Action by Assignee.—A complaint in an action by an assignee to recover on a claim due his insolvent held sufficient after judgment, under Code Civ. Proc. § 1963, subd. 15.—Farnsworth v. Sutro, Cal., 68 Pac. Rep. 705.

100. INSOLVENCY—Receiver's Accounts.—An order allowing the receiver's account, and refusing to surcharge the same under the claim that the receiver was guilty of positive fraud, involves the conclusion of fact that the receiver's conduct was in good faith, without more specific findings.—Minneapolis Trust Co. v. Menage, Minn., 90 N. W. Rep 3.

101. INTOXICATING LIQUORS — Damages.—In an action by a wife for selling intoxicating liquors to her husband, allowing the husband's injuries to be exhibited to the jury to show the degree of impairment of his earning capacity was not error.—Faivre v. Manderschied, Iowa, 90 N. W. Rep. 76.

102. JUDGMENT— Breach of Warranty. — In an action on a note for the price of certain implements, where defendant set up an express promissory warranty, held on verdict for defendant, where no offer was made to cure defects in answer, an order directing judgment for plaintiff notwithstanding the verdict should have been made. — Plano Mfg. Co. v. Richards, Minn., 90 N. W. Rep. 120.

103. JUDGMENT — Correction. — A judgment entered against a firm could not afterwards be corrected, so as to show that it was also rendered against a particular defendant, individually, without evidence of any real intent so to do. — Graham Paper Co. v. Wohlwend, Iowa, 89 N. W. Rep. 1068.

104. JUDGMENT — Suit to Set Aside. — A judgment against a husband, wife, and third person, decreeing the husband to be a surety of the latter, held, in a suit to set the judgment aside, not to show that the debt was one not authorizing a judgment binding on the separate property of the wife.—Bergstrom v. Kiel, Tex., 67 S. W. Rep. 781.

105. JUDGMENT — Transcript. — Under Code, § 4538, a justice's judgment does not become a district court judgment by merely filing a transcript with the clerk; but it must be entered in the judgment docket and lien index.—State Ins. Co. v. Prestage, Iowa, 90 N. W. Rep. 62.

106. JUDGMENT — Unanimity of Verdict. — A verdict by a jury, three-fourths concurring, rendered December 13, 1900, held not aided by the constitutional amendment adopted at the general November election of that year, but not becoming operative until December 19th.—Girdner v. Bryan, Mo., 67 S. W. Rep. 699.

107. JUSTICES OF THE PEACE— Appeal.—Appeal from justice's entry of general appearance and notice of trial by appellee waives failure to file the statutory bond

and affidavits within the required time.—Goodin v. Van Haaften, Mich., 90 N. W. Rep. 28.

108. JUSTICES OF THE PEACE—Appeal Bond.—Where an appeal bond, filed on appeal from a justice, is insufficient to give the district court jurisdiction, the latter court cannot authorize the filing of an amended bond, but the appeal must be dismissed. — Seabold v. Schevers, Iowa, 89 N. W. Rep. 1121.

109. JUSTICES OF THE PEACE—Jurisdiction.—Where all the parties to an attachment in justice court appeared, the question of the justice's jurisdiction of their persons held waived, rendering the failure of the record to show jurisdiction within Rev. St. 1899, § 3840, immaterial. —Miller-Arthur Drug Co. v. Curtis, Mo., 67 S. W. Rep. 712.

110. LANDLORD AND TENANT—Action for Possession.— In an action against a tenant for possession, it was not error to refuse to instruct that plaintiff must prove that defendant agreed to leave the premises on March 31st, as evidence that he rented for a fixed period ending on that day would be sufficient.—Lautmann v. Miller, Ind., 63 N. E. Rep. 761.

111. LANDLORD AND TENANT — Condition Against Assignment.—A condition in a lease prohibiting its transfer or assignment is not violated by an assignment by the lessee as security for an indebtedness.—Crouse v. Michell, Mich., 90 N. W. Rep. 32.

112. LANDLORD AND TENANT— Share of Crops as Rent. —Party leasing farm, paying share of the crops as rent, held a tenant, and owner of the entire growing crop entitled to recover damages to the whole, where caused by another's negligence. — Holt Mfg. Co. v. Thornton, Cal., 68 Pac Rep. 708.

113. LANDLORD AND TENANT— Specific Performance.— An agreement to lease a building for "one or more years" held sufficiently definite as to duration of the term to support a suit for specific performance. — Boston Clothing Co. v. Solberg, Wash., 68 Pac. Rep. 715.

114. LIBEL AND SLANDER—Evidence. – Evidence of an assault by defendant on plaintiff half an hour after the uttering of a slanderous statement held admissible, in an action for the slander, as showing actual malice.— Zurawski v. Reichmann, Iowa, 90 N. W. Rep. 69.

115. LICENSES—Occupation Tax. — A classification of persons going from house to house vending their own products, and those who sell in the same way the production of others, for purposes of an occupation tax, is based on a valid distinction. — Rosenbloom v. State, Neb., 89 N. W. Rep. 1053.

116. LIFE ESTATES — Sale to Satisfy Lien.—Court, ordering sale of certain lots belonging to life tenants and remainder-man to prevent threatened destruction of balance of estate by tax and other liens, held to have power to order sale of additional lot, when the proceeds of first sale proved insufficient. — Ruggles v. Tyson, Wis., 90 N. W. Rep. 113.

117. LIFE INSURANCE— Evidence — In an action on a life policy, where the company alleged that the insured at the time of the issuance of the policy was, and for a long time had been, sick of several serious diseases, non expert witnesses held competent to testify as to her apparent physical condition.—Reininghaus v. Merchants' Life Assn., Iowa, 89 N. W. Rep. 1113.

118. LIFE INSURANCE — Non-Payment of Premium. — Contention that persons who had undertaken to pay assured's insurance premiums knew that the policy would be forfeited if they were not paid at a certain date held untenable. — Newton v. Southwestern Mut. Life Assn., Iowa, 90 N. W. Rep. 73.

119. LIMITATION OF ACTIONS— Accrual of Action. — A cause of action on a promise to pay for services by will accrues at the employer's death, and limitations do not run until that time.— Gullet v. Gullet, Ind., 63 N. E. Rep. 782.

120. LIMITATION OF ACTIONS — Amended Petition. — Amended petition in personal injury suit against a railway held not varient from the original petition, so as to let in bar of limitations.— Taylor v. Atchison, T. & S. F. Ry. Co., Kan., 68 Pac. Rep. 691.

121. LIS PENDENS—Wife's Property.— Where one having a judgment against a husband for family expenses sues to subject the wife's property to it, by virtue of Code, § 3165, the rights of one who purchases such property after the suit are subject to plaintiff's remedy. —Boss v. Jordan, Iowa, 89 N. W. Rep. 1070.

122. MALICIOUS PROSECUTION—Evidence.—In an action for malicious prosecution, allowing plaintiff to testify that, when he was arrested and taken to prison, other prisoners called him by name and wanted to know what he was doing there, was not reversible error.—Flam v. Lee, Iowa, 90 N. W. Rep. 70.

123. MALICIOUS PROSECUTION—Probable Cause.—In an action for malicious prosecution on charge of attempting to murder defendant's daughter, evidence of plaintiff's statements that the daughter was unchaste was not admissible to rebut presumption of malice in causing plaintiff's arrest.— Flam v. Lee, Iowa, 90 N. W. Rep. 70.

124. MANDAMUS—County Treasurer.— When any considerable amount of tax levied to pay judgment is in the hands of a county treasurer, his duty to pay a warrant on the judgment may be enforced by *mandamus*. — State v. Scotts Bluff County, Neb., 89 N. W. Rep. 1063.

125. MASTER AND SERVANT—Injury to Brakeman.—That cutting off the engine while the train was in motion was unusual on other roads held not to show negligence on the part of a railroad company, in an action for personal injuries received by a breakman while so engaged. — Gorman v. Minneapolis & St. L. Ry. Co., Iowa, 90 N. W. Rep. 79.

126. MASTER AND SERVANT — Negligence of Fellow-servant.—Defendants engaged in straightening a line of railroad track, and using trains with employees to operate the same, in the performanee of the work held within Rev. St. Wis. 1898, § 1816, providing that every railroad company shall be liable for damages sustained by any of its employees by reason of the negligence of fellow-servants.— Roe v. Winston, Minn., 90 N. W. Rep. 122.

127. MASTER AND SERVANT — Personal Injury. — In an action by an employee for personal injuries, an instruction as to the master's duty to furnish reasonably safe machinery held proper — Gustafson v. Seattle Traction Co , Wash., 68 Pac. Rep. 721.

128. MORTGAGES— Appraisal. — Where land was appraised at $2,500 on foreclosure, the fact that the mortgagors themselves fixed the value at $4,400 is no ground for setting aside the appraisal. — Moulthan v. Apking, Neb., 89 N. W. Rep. 1051.

129. MORTGAGES — Foreclosure. — Where plaintiff in foreclosure makes a *prima facie* case that no proceedings have been had at law, it is sufficient where there is no evidence to the contrary. — President, Etc., of Insurance Co. of North America v. Parker, Neb., 89 N. W. Rep. 1040.

130. MUNICIPAL CORPORATIONS — Change of Grade. — Under a city charter giving the common council authority to change the grade of streets, held, that informality in report of assessment did not affect the rights of the landowner or the validity of the special assessment against his property — State v. Blake, Minn., 90 N. W. Rep. 5.

131. MUNICIPAL CORPORATIONS—Defective Sidewalks. —A spike projecting from a plank in a sidewalk, and loose planks in the walk, are not of themselves such obvious defects as to charge a pedestrian with notice thereof as matter of law. — Rusch v. City of Dubuque, Iowa, 90 N W. Rep. 80.

132 MUNICIPAL CORPORATIONS — Public Nuisance. — Only those suffering special pecuniary damages different in kind from that suffered by the public at large can maintain an action for damages for obstruction of a public street.—Wilson v. West & Slade Mill Co., Wash., 8 Pac. Rep. 716.

133. MUNICIPAL CORPORATIONS—Village Water Supply.—Contract between village and an owner of a spring held not to require village to take all its water for all purposes from the spring. — Gregory v. Village of Lake Linden, Mich., 90 N. W. Rep. 29.

134. NEGLIGENCE—Damages.—In an action against a railroad company for injuries sustained by a passenger, pain and suffering are to be considered as elements of damage.—Pence v. Wabash R. Co., Iowa, 90 N. W. Rep. 59.

135. NEGLIGENCE—Fires Started by Locomotives.—In an action to recover for injuries to a farm by fire, evidence as to the value of the farm before and after the fire, though largely based on the cost of replacing the fences destroyed, held not erroneous. — Thompson v. Keokuk & W. R. Co., Iowa, 89 N. W. Rep. 975.

136. NEGLIGENCE—Turntable.—A railroad company is liable for injuries received by a child while playing on the company's turntable, where the same was not properly guarded and fastened.—Edgington v. Burlington, C. R. & N. Ry. Co., Iowa, 90 N. W. Rep. 95.

137. NEW TRIAL—Determination. — Where motion for new trial is made on the minutes of the court, it is not required to determine the motion *de novo* on a settled case.—J. I. Case Threshing Mach. Co. v. Hoffman, Minn., 90 N. W. Rep. 5.

138. PARTNERSHIP—Failure to File Certificate.—Where a partnership which has failed to file certificate in district court, as required by St. 1893, §§ 3539, 3541, brings suit, and assigns its interest to an individual partner, such assignment could not avoid the force of the statute, so as to entitle the assignee to maintain the action.—Choctaw Lumber Co. v. Gilmore, Okla., 68 Pac. Rep. 733.

139. PARTNERSHIP—Land Held in Common.— Land belonging to partnership, but appearing on record to be owned by partners as tenants in common, held subject to levy of individual creditor, not knowing of partnership ownership.—First Nat. Bank v. State Sav. Bank, Mich., 89 N. W. Rep. 941.

140. PATENTS—Misconstruction of Patent Law.—A person to whom a patent has been issued by the United States land department by misconstruction of law holds the land for the benefit of the person to whom it should have been issued.—Gage v. Gunther, Cal., 68 Pac. Rep. 710.

141. PHYSICIANS AND SURGEONS — Malpractice.—In an action for malpractice, an instruction that "a departure from approved methods in general use, if it injures the patient, will render him (the physician) liable, however good his intentions may have been," held not improper.—Allen v. Voje, Wis., 89 N. W. Rep. 924.

142. PLEADING — Election.—Where plaintiff alleged a lien for materials furnished, and defendant denied the allegation, an averment that the person who furnished them had been paid was not a plea of payment, requiring defendant to elect between the alleged defenses.—Norris Safe & Lock Co. v. Clark, Wash., 68 Pac. Rep. 718.

143. PUBLIC LANDS — Bona Fide Purchaser.—Citizenship, or declaration of intention to become a citizen, and a *bona fide* purchase, held essentials required by Act Cong. March 6, 1887, relating to purchasers of lands granted to railroad, and that the right of one who purchased land from a railroad company prior to Act March 3, 1887, to perfect title under section 5 of that act is superior to the settlement right of another person acquired after the passage of such act.—O'Connor v. Gertgens, Minn., 89 N. W. Rep. 866.

144. PUBLIC LANDS—Issuance of Patent.—The decision of a secretary of the interior on a contest preliminary to the issuance of patent to public lands cannot be invoked to preclude a re-examination by his successor.—Gage v. Gunther, Cal., 68 Pac. Rep. 710.

145. REMOVAL OF CAUSES — Constitutional Question.—Where a constitutional question, which is not waived, is involved, the cause must be transferred to the supreme court.—McClure v. Feldman, Mo., 67 S. W. Rep. 732.

146. SALES—Breach of Contract.—The seller of an article, or of skill, labor, and materials is not entitled to recover as for a breach of contract, without a finding that the article offered is the kind called for by the contract or which the purchaser is bound to accept.—Wright v. Ramp, Oreg., 68 Pac. Rep. 781.

147. SALES—Breach of Warranty.—Where an implement is sold under an express warranty, it is necessary for the party relying thereon to plead and prove what it was actually worth and what it would have been worth if as warranted.—Plano Mfg. Co. v. Richards, Minn., 90 N. W. Rep. 120.

148. SCHOOLS AND SCHOOL DISTRICTS — Ultra Vires Contract.—Where a board of education seeks to avoid a contract as *ultra vires*, the burden is on it to allege and prove such defense —Morgan v. Board of Education of City and County of San Francisco, Cal., 68 Pac. Rep. 703.

149. SPECIFIC PERFORMANCE — Fraud in Procurement of Contract.—Fraud in procuring a contract for the exchange of a stock of general merchandise for a farm held to prevent enforcement of a forfeiture therein provided for.—McDowell v. Caldwell, Iowa, 89 N. W. Rep. 1111.

150. STATUTES — Taxation.—A particular classification may be valid if the object of the statute is to raise revenue and invalid if the object is regulation.—Rosenbloom v. State, Neb., 89 N. W. Rep. 1053.

151. STATUTES—Title of An Act —Under Const. art. 4, § 18, the statement of the subject in the title of an act should suggest all the details thereof, including everything found in the body of the act which facilitates its object.—Dianna Shooting Club v. Lamoreaux, Wis., 99 N. W. Rep. 880.

152. STATUTES — Title of an Act.—An ordinance whose main object is to license a business held not wholly void because a provision imposing a small occupation tax is not clearly expressed in its title.—Morgan v. State, Neb., 90 N. W. Rep. 108.

153. STREET RAILROADS — Contributory Negligence.—In an action against a street railway for injuries received at a crossing, held error to instruct that plaintiff might recover notwithstanding contributory negligence.—Csatlos v. Metropolitan St. Ry. Co., 75 N. Y. Supp. 583.

154. STREET RAILROADS — Liability of Purchasing Company.—A street railway company, purchasing the property of another company, under Comp. Laws 1897, § 6448, held to take the road subject to all the obligations of the grantor.—Grosse Pointe Tp. v. Detroit & L. St. C. Ry., Mich., 90 N. W. Rep. 42.

155. SUNDAY—Delivery.—A note is valid, though signed on Sunday, where not delivered on that day.—Barger v. Farnham, Mich., 90 N. W. Rep. 281.

156. TAXATION—Classification.—Classification for purposes of taxation, to be valid, must rest on some reason of public policy, and some substantial difference of situation or circumstances, which would suggest the justice or expediency of such classification.—Rosenbloom v. State, Neb., 89 N. W. Rep. 1053.

157. TAXATION — Enjoining Collection.—In a proceeding to enjoin the collection of a tax, a finding that the assessor listed the property by the description used in a patent for the claims held sustained by the evidence.—Eureka Dist. Gold Min. Co. v. Ferry County, Wash., 68 Pac. Rep. 727.

158. TAXATION — Money Held for Investment.—Money and credits belonging to a citizen of another state in the hands of an agent in his state are taxable here, after the agency has been revoked by the death of the owner, and the property become subject to local administration, until it is transferred by order of court to the administrator appointed in the state where the owner resided.—*In re* Miller's Estate, Iowa, 90 N. W. Rep. 89.

159. TAXATION — Tax Lien —Under the constitution, a petition to foreclose a tax lien which does not show that two years have expired from the time of the sale

does not state a cause of action.—Iodence v. Peters, Neb., 89 N. W. Rep. 1041.

160. TAX DEED—Color of Title.—A tax deed, though void on its face, constitutes color of title, and the real owner is entitled to have it canceled.—Stokes v. Allen, S. Dak., 89 N. W. Rep. 1023.

161. TENANCY IN COMMON—Tax Title.—Purchase of tax title by co-tenant held to effect a redemption of the property from the tax sale, and therefore that a mortgage given by another co-tenant on his undivided interest was not extinguished.—Blumenthal v. Culver, Iowa, 89 N. W. Rep. 1116.

162. TRESPASS—Adjoining Landowners.—One who extends her arm over a fence dividing her own premises from those of another is a trespasser, though her body remains on her own side of the fence.—Hannabalson v. Sessions, Iowa, 90 N. W. Rep. 93.

163. TRIAL—Contest of Will.—Where instructions as to soundness of mind in a will contest are not erroneous, and further instructions are not asked, appellants cannot complain that the instructions were not more full.—*In re* Hull's Will, Iowa, 89 N. W. Rep. 979.

164. TRIAL — Erroneous Instruction.—An instruction requiring the jury to weigh with "caution" the testimony of an expert as to his opinion held erroneous.—Gustafson v. Seattle Traction Co., Wash., 68 Pac. Rep. 721.

165. TRIAL—Evidence.—Where a contract offered in evidence by defendant was rejected on plaintiff's objection, but its rejection did not preclude the introduction of other evidence by defendant, it was not error to admit it, after the commencement of the argument, on the withdrawal of such objection, though defendant then objected thereto.—Kerslake v. McInnis, Wis., 89 N. W. Rep. 895.

166. TRIAL — Failure to Request More Comprehensive Instruction.—Where an instruction is given was a correct statement of the law applicable to the case, a failure to give a more comprehensive instruction is not error, in the absence of a request therefor.—Kellar v. Lewis, Iowa., 89 N. W. Rep. 1102.

167. TRIAL — Form of Verdict.—Objections to the form of a verdict, not made until motion for new trial is filed, are waived.—Kingman Imp. Co. v. Strong, Neb , 89 N. W. Rep. 993.

168. TRIAL—Instructions.—Refusal to give instructions whose subject is covered by others held not error, where the requests therefor were not read before the jury.—Ludwig v. Metropolitan St Ry. Co., 75 N. Y. Supp. 667.

169. TRIAL—Malicious Prosecution.—In charging the jury on questions submitted for special verdict, it was error for the court to deal with several questions in one instruction.—Cullen v. Hanisch, Wis , 89 N. W. Rep. 900.

170. TRIAL—Questions of Fact.—If there is any credible evidence for plaintiff, however it may be contradicted, a question of fact arises, to be passed on by the jury.—Allen v. Voje, Wis., 89 N. W. Rep. 924.

171. TRIAL—Submitting Issue to Jury.—Where a party requests the submission of a question to the jury by an instruction which is refused, he cannot complain of an instruction by the court submitting the same issue.—Kennard v. Grossman, Neb., 89 N. W. Rep. 1025.

172. TROVER AND CONVERSION—Instruction Defining Conversion.—In defining conversion, it is not error to leave out the element of plaintiff's right of possession, where that question is fairly submitted in another instruction.—Pecha v. Kastl, Neb., 89 N. W. Rep. 1047.

173. TRUSTS—Domestic Judgment.—Where a resident of another state bequeathed bonds and securities to a resident trustee for the benefit of testator's daughter, the liability of the trust income to be subjected to a domestic judgment against the daughter would be determined by the law of the *situs* of the estate.—Keeny v. Morse, 75 N. Y. Supp. 728.

174. TRUSTS—Resting in Parol.—A trust required by statute to be in writing is not void, but merely unenforceable, when resting in parol, and a conveyance by the trustee in discharge of the trust is based on sufficient consideration as against strangers.—McCormick Harvesting Mach. Co. v. Griffin, Iowa, 90 N. W. Rep. 84.

175. TRUSTS—Sale of Stock.—Constructive trust held to arise, independently of any question of fraud, in proceeds of a sale of live stock, an advance draft on which had been discounted as usual by plaintiff and dishonered by defendant commission men, contrary to their usual custom, and with knowledge that proceeds of the discount had been used to purchase the stock.—Barnes v. Thuet, Iowa, 89 N. W. Rep. 1085.

176. USE AND OCCUPATION—Conveyance by Owner.—One who has conveyed land has a right to sue for compensation for the occupancy before the conveyance.—Bowie v. Herring, Iowa, 89 N. W. Rep. 976.

177. VENDOR AND PURCHASER—Bond for Deed.—On refusal of vendor to convey land as required by bond for deed, vendee held entitled to rescind and recover purchase money paid, together with value of improvements.—Isaacs v. Bardon, Wis., 89 N. W. Rep. 913.

178. VENDOR AND PURCHASER—Default in Payment.—Vendees, who defaulted in payment and permitted the land to be sold under the vendor's lien, were not in a position to enforce an agreement that, if a certain railroad was not completed within a certain time, they might reconvey and recover back the payments.—Pence v. Adams, Iowa, 89 N. W. Rep. 1065.

179. VENDOR AND PURCHASER—Fraud and Misrepresentation.—Complaint in an action by vendees to rescind a written contract for the sale of land, for the fraud and misrepresentation of defendant, held to set forth a cause of action.—Peterson v. Landahl, Minn., 89 N. W. Rep. 1131.

180. VENDOR AND PURCHASER — Quitclaim Deed.—A purchaser of real estate, taking title by quitclaim deed with actual knowledge of the existence of an unrecorded mortgage, is not an innocent purchaser.—Enyart v. Moran, Neb., 89 N. W. Rep. 1045.

181. VENUE—Motion to Remand.—A motion after trial and verdict rendered, to remand a cause, the place of trial of which had been changed, held too late, in view of the provisions of Rev. St. 1898, § 2628.—Allen v. Voje, Wis., 89 N. W. Rep. 924.

182. VENUE—Transmitting Papers.—Under Code, § 3500, failure of the clerk to transmit a part of the record until four days after a change of venue was granted held not to deprive the court to which the cause was sent of jurisdiction.—Faivre v. Manderschied, Iowa, 90 N. W. Rep. 76.

183. WILLS—Mental Capacity.—The weakened physical and mental condition of a testator, and his inability to attend to business generally, does not show want of mental capacity, if he understands the nature of the will, his property, objects of his bounty, and the manner of disposing of his estate.—Perkins v. Perkins, Iowa, 90 N. W. Rep. 55.

184. WILLS—Witnesses.—A notary public, taking an acknowledgment of witnesses to a will and attaching his certificate thereto, held not a witness, unless he is asked to witness the execution thereof, and affixed the certificate with the knowledge of testator that he was signing as a witness.—*In re* Hull's Will, Iowa, 89 N. W. Rep. 979.

185. WITNESSES—Fees.—Where hydraulic engineers were called as experts, an allowance of from $20 to $25 per day witness fees was within the discretion of the court.—Farmer v. Stillwater Water Co., Minn., 90 N. W. Rep. 10.

186. WORK AND LABOR—Services of Adult Son.—The presumption that the services of an adult son, rendered for the father while residing at the family home, are gratuitous, is not rebutted by evidence of declarations of the father to third persons that the services are valuable and will be paid for.—Donovan v. Driscoll, Iowa, 90 N. W. Rep. 60.